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RELIGION MORALITY AND LAW

ROBERT E. FITCH
ARTHUR L. HARDING
WILBER G. KATZ
JOSEPH D. QUILLIAN, JR.

EDITED WITH AN INTRODUCTION BY
ARTHUR L. HARDING

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INTRODUCTION

"WITHOUT RELIGION there can be no morality: and without morality there can be no law." So wrote Sir Alfred Denning, Lord Justice of the Court of Appeal in England, under the title "The Influence of Religion" in his recently published volume, *The Changing Law*. Despite the pre-eminence of the author as one of the ablest and most progressive of English judges, this sentence caused no little lifting of English brows. Somehow in America this statement does not appear to be startling; but it is challenging. It is in a sense the motif of what follows in this volume.

Previous annual Conferences on Law in Society have explored much of the background essential to a discussion of Sir Alfred's proposition. The 1953 conference examined the sources of certain Natural Law theories: the classical Stoic doctrine as formulated by Cicero; the Christianized Stoicism of Saint Thomas Aquinas; and Richard Hooker's synthesis of Saint Thomas' Scholasticism with English tradition and Conciliar theology. The 1954 conference discussed the impact upon these older doctrines, and upon the assumptions underlying them, of the theology of classical Protestantism, and explored John Locke's harmonization of the Anglo-Catholic position of Hooker with the later Arminian theology and with Continental rationalism. These discussions made plain to all who heard them the tremen-

dous effect which differing religious doctrines of the nature of man and of his place in the universe have had upon theories of law. These discussions, however, left unanswered the proposition here posited: Is some sort of religious doctrine essential to law? The 1955 conference accordingly was directed to that issue.

Sir Alfred's statement is in two stages: that there can be no morality without religion, and that there can be no law without morality. The 1955 conference accordingly attacked the question in two stages. Mr. Fitch undertakes to answer whether there can be morality without religion. This is but another way of asking whether there can be an effective humanist ethic without religious assumptions or religious goals. Approaching his subject both historically and pragmatically, he analyzes ethics in terms of the five principal values: pleasure, power, duty, wisdom, and love. The three last named are found to be related always in some religious context; only pleasure and power can claim to be entirely secular. Historically ethics of pleasure and power have failed. Hedonism has failed because it could not satisfy the human yearnings of even those who would advocate it. Even those who sought only pleasure tended to reach for something, some source of pleasure, beyond mundane things. Historically, the power ethic has destroyed itself. Why these things have been and seemingly must be, Mr. Fitch examines in detail.

The second essay is concerned with the question of whether morality is essential to law. It is essentially an essay of definition, seeking to relate differing concepts as to the nature of law to concepts of morality. It concludes with an insistence that law must be counted as a living and human institution, not as a collection of abstract verbalizations, and that as a

human institution law cannot escape human morality. It is to be noted that this discussion proceeds upon what might be called a religious assumption: that man has at least a certain freedom of choice in his conduct. Most religious doctrine assumes a freedom in man to choose between good and evil. However, a purely secular doctrine of man might well make the same assumption. What is rejected is, on the one hand, an extreme predestinarian theology which would deny freedom of choice, and, on the other hand, the various pseudo-scientific determinisms recently in vogue. If, upon one or the other of these extreme positions, we deny all freedom of the human will, then human law itself becomes a meaningless institution.

Passing from general discussion to a specific topic, Mr. Katz analyzes the relationship of religious doctrine to a particular legal problem, that of punishment for crime. Here he encounters what is thought to be a serious contemporary problem. A good deal of current thinking about criminal punishment is based upon an eighteenth-century rationalistic view of man, that he exercises a complete freedom of choice in his dealings with others. Punishment in this theory is thought to be based upon the moral fault of such a man in choosing evil rather than good. Those who would justify criminal punishment upon such a ground are troubled deeply by the insights of modern psychology which teach that the freedom of the individual man in the circumstances may not be nearly as great as was once imagined. The question arises, can punishment be imposed where the moral fault is in cultural environment, in parents, or in other places outside the individual concerned? Can the idealistic ethic justify a vicarious criminal responsibility? To answer these questions Mr. Katz has resort to the religious concept of man, with

particular reference to Lutheran theology. The ensuing insight is most helpful, not only as an aid to the understanding of a good deal of what currently is being done in criminal punishment, but also because it indicates ways in which criminal punishment may both be made more effective and be brought into greater harmony with prevailing morality.

Historically the most obvious connection between religious and legal doctrines may be found in the varying concepts of Natural Law which have evolved or have been formulated through the ages. The relevancy to American law of the religious Natural Law doctrines of Locke, Hooker, Aquinas, Coke, Bracton, and others is well known. The Deism of Jefferson, the Arminianism of Grotius, even the pagan but not quite irreligious Stoicism, also contributed. Natural Law doctrines do afford a convenient matrix for the study of such relationships. But Natural Law doctrines have been out of favor. Some have argued that Kantian metaphysics has destroyed the rational basis of such a doctrine; others have said that empirical science has demonstrated its untruth. These matters are not here argued.

Attention is given, however, to another and religious facet. One of the claimed grounds for the rejection of Natural Law reasoning is its supposed incompatibility with Protestant theology, specifically with John Calvin's doctrines of total depravity, election, and predestination. Unfortunately, some of the rejection is entirely superficial: a feeling that since Saint Thomas taught Natural Law, and since Thomism is an essential part of the theology of the Roman church, a Protestant necessarily must deny the validity of Natural Law. The weaknesses in such approaches have been demonstrated in earlier conferences. Father Davitt's presentation of Aquinas in the 1953 conference makes it plain that the

doctrine does not rest upon any religious doctrine which is peculiar to the Roman church, although that church did rely upon it during the Reformation period. In the same conference Professor Marshall showed that Hooker had little difficulty adapting the Thomist doctrine to the Anglican church. Mr. Outler's survey of the classical Protestant doctrine in the 1954 conference showed no fundamental incompatibility with the essential elements of Natural Law thinking. In the present volume an eminent theologian attacks the problem directly, seeking to relate Natural Law with Christianity, without reference to distinctively Roman or Protestant doctrine. His approach is based upon those elements common to all branches of Christianity, and particular reference is made to the writings of the early Fathers of the Church. This presentation should go far to dispel difficulties based upon misunderstanding of basic Christian doctrine or upon misapplication of sectarian dogma.

The Southern Methodist University School of Law and the Southwestern Legal Foundation are grateful to these eminent scholars who have contributed so greatly to the success of the 1955 Conference on Law in Society. These papers are published in the hope that others not privileged to attend the conference may gain the valuable insights accorded those who did. To reach a wider audience, Mr. Fitch's paper was published in the Winter, 1956, issue of the *Southwest Review*. Mr. Quillian's paper is based in part upon research done by him in Yale University in the preparation of his dissertation entitled "The Relationship of the Doctrine of Natural Law to the Doctrine of Grace and the Doctrine of Love."

As in previous years, the conduct of the 1955 conference and the publication of the proceedings were made

possible by the gifts of devoted servants of the law. We are grateful to Mr. Dwight L. Simmons of the Dallas Bar and to Mr. Howell Ward of Corpus Christi for their interest and support.

ARTHUR L. HARDING

The School of Law
Southern Methodist University

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RELIGION, MORALITY, AND LAW

CAN THERE BE MORALITY WITHOUT RELIGION?

Robert E. Fitch

THE QUESTION "Can there be morality without religion?" may be answered concisely in two words: "Yes, but! . . ." The "yes" allows for those exceptions to the rule that obtain in all human affairs, and recognizes those areas and occasions when man can do briefly and in relative isolation what he cannot perform permanently and in the larger social context. The "but" reflects the several inadequacies and internal contradictions of a humanist ethic and also the greater scope and viability of a religious ethic, which constrain us to the conclusion that, for all practical purposes and by any realistic standards, we must convert the "yes" to an emphatic "no!"

In order that there may be common ground in this discussion, let us agree to a common-sense definition of a few terms. We shall use *humanism* and *secularism* to designate morality without religion. We shall recognize that there are humane humanisms and inhuman humanisms, just as there are humane religions and

inhuman religions. Moreover, when we speak of religion and morality, we shall frankly acknowledge that we are concerned with good religion and with good morals, not with an evil religion and a bad morality. If, indeed, a base morality can be supported either on religious or on humanist assumptions, this will not be counted to the credit either of religion or of humanism. And when we speak of good morality in this context, we shall have reference to those values which are enshrined in the great ethical tradition of the West, as it comes to us from Hebrew prophets and lawgivers, from Greek philosophers, and from Christian seers and saints, as it is written into the best pattern of Roman law and of English common law, and as it is embodied in those social institutions which reflect the liberty and the justice and the regard for the person which make life decent and lend it significance.

Let us also agree on the method of conducting our inquiry. Where there is disagreement about fundamental assumptions, there can be no profit in dogmatic deductions. Here the only common ground between the religionist and the humanist will be found in strict adherence to the method of empiricism—the appeal to fact and to experience. Such a method will never satisfy the absolutist, but it should be congenial to the Christian who appreciates the radically empirical and historical character of his faith, and it can hardly give offense to the humanist who wishes to dismiss the superstitions of the supernatural and to ground his morality on the solid facts of nature and of human nature. This means that we must proceed by case studies, by representative samples, and by putting forth a series of empirical generalizations drawn from the facts of history. In themselves they will not yield a rational certitude, but they do make possible a calculus of prob-

abilities. As for myself, I do not know how to live other than by probabilities and by faith.

I

All prevailing systems of morality are rooted in religion.

The word "prevailing" is crucial in this proposition. We are looking over the world scene to note what systems of morality have prevailed, or are prevailing, and to ask what may have been their foundation. With one notable exception in the contemporary world we cannot find any widely prevailing systems of morality that are not rooted in religious faith.

The notable exception, of course, is communism. It appears to be the first instance in history where whole sectors of society have been officially organized on atheistic and materialistic assumptions. This is an instance which not too many humanists in the United States will be eager to appropriate. Moreover, there are two grounds on which the charity of the Christian scholar may seek to relieve the humane humanist of this incubus. For one thing, as social institutions go, the communist experiment is too recent and too brief to provide the basis for secure generalizations. At this time it is not at all apparent that, even in Russia, the communist ideology has been able to obliterate the historic folkways of the people as these are related to the Orthodox church. And it still remains to be seen whether communism in China can permanently destroy the indigenous tradition of Confucian and of Buddhist ethics.

The second factor is that the positive ethical ingredient in Marxism—the passion for social justice—obviously derives from the Hebrew prophets. In this respect

Karl Marx was a good Jew, standing in the best of the religious and ethical heritage of his people, in spite of an early perfunctory induction into the Lutheran confession and an eventual affirmation of atheism. Indeed, we should speak of Marxism as a Jewish heresy rather than as a Christian heresy. If I have some hesitation about putting this down in print, it is because it may serve as a pretext either for someone to accuse me of anti-Semitism, or for someone else to find further warrant for his own anti-Semitism. But it is important to realize that Marxism, unlike nazism, began as an idealistic and humanitarian reform, and that, to the extent that it was sincere in its proclamation of justice for the oppressed and the underprivileged, it spoke with the voice of an Amos, a Micah, and an Isaiah.

Communism as an apparent but questionable exception to our generalization about prevailing systems of morality is more than overwhelmed by the supporting instances. It is proper to speak of the morality of Western nations as Hebrew-Christian, just as it is proper to speak of the morality of India as Hindu, of the morality of Pakistan as Moslem, of the morality of the older China as Buddhist and Confucian, and of the morals of Japan as a blend of the Chinese elements with the native Shinto heritage. More than this one can even distinguish, within the West, the Roman Catholic from the Protestant cultural patterns. Surely no historian, no cultural anthropologist would think of discussing the civilizations of the Near and the Far East without noting the impact of their religions upon their morals. What is peculiar is that some persons think they can discuss the ethics of the West without reference to the Judeo-Christian framework. Doubtless the reason for this is that our Hebrew-Christian moral heritage is so widely and deeply pervasive that we simply take it for

granted, and hence ignore it, until the shock of impact with a non-Christian culture reminds us sharply of the religious roots of our own.

At this point, of course, there will be those who begin to cite the historic "crimes of Christianity." I have no desire to minimize these crimes. But one might with equal justice speak of the crimes of democracy, or of the crimes of science. After all, it was the democracies that were the great imperialistic powers in the nineteenth century, and it is modern nuclear physics which has put the terrors of hell in our hands as well as the comforts of a middle-class heaven. Indeed, all things excellent in the hands of man contain ambiguous possibilities for good and for evil. Rome and Britain, if you like, were the two Western nations most guilty of imperialistic aggressions; they were also the two nations in the world which gave us our best political and legal institutions. The fact that a people can degrade and corrupt its religious heritage does not alter the fact that the best of its folkways and the noblest of its aspirations are sustained by that heritage.

Perhaps the best proof of our thesis at this point lies with the individual agnostic or atheist. One cannot help remarking that the agnostic in India differs in his morals from the agnostic in China and from the atheist in the West. Most of these gentlemen will doubtless insist that they derive their moral principles from pure reason, though some few may claim to have arrived there by mystical illumination. But it is a curious fact that pure reason and illumination in ethics when found in India turn out to have Hindu characteristics, in China turn out to be marked by Buddhism and Confucianism, and in the West bear the unmistakable stigmata of the Hebrew-Christian heritage.

The effect of this first generalization, that all prevail-

ing codes of ethics are rooted in religion, is simply to place the burden of proof on the humanist. The initial probabilities are against him. This does not mean that what he proposes we should do might not be better than what we have done. It simply means that, by any empirical standards, the humanist has quite a task on his hands to show that morality can exist, in a widely prevailing form, without a foundation in religion.

II

The humanist ethic at its best is the tool of a religious ethic.

There is a perverse tradition in the writing of history whereby we ascribe every excellence in our civilization to the impulses of the Renaissance. It is forgotten that our Renaissance occurred within the context of a Hebrew-Christian culture, that it was most creative in social institutions when it was loyal to that cultural heritage, and that it turned brutal and cruel when it repudiated that heritage.

The period of the Enlightenment in the eighteenth century is often pointed to as a triumph of secularism. It was from the Enlightenment that we received the worthy ideals of freedom, equality, peace, toleration, humanitarianism. But where did the Enlightenment get these ideals? Of one thing we may be sure: it did not get them from the Greek philosophers. Each of these ideals is repudiated, to a greater or lesser degree, in the writings of Plato and Aristotle. The fact is, the ideals of the Enlightenment are a rational dilution of the ideals of Christanity. When an Enlightenment occurs in an Asiatic culture, it produces an entirely different set of ideals.

The several civil liberties are the overt expression, in

social institutions, of the inward spiritual freedom of the Christian. This can be clearly traced in John Milton, Roger Williams, John Locke; its beginnings can even be discerned in Martin Luther. The doctrine of equality is simply the legal and political expression of the ideal of human brotherhood. As Reinhold Niebuhr has remarked, "Equality is love in terms of logic."[1] Indeed, the Christian ideal of love is variously translated as humanitarianism, as equality, and as toleration. With each translation from the religious to the secular, there is a loss in content and in vitality, but there is a gain in political implementation. The point is that you cannot possibly legislate spiritual freedom, love, brotherhood. But you can legislate civil liberties, specific equalities, acts of toleration, and specific principles of humanitarianism.

Another instance of how humanism at its best is the often unconscious tool of a religious ethic is found in the utilitarian tradition of Jeremy Bentham and John Stuart Mill. Both of these men were agnostics and anticlericals. Bentham stigmatized the "theological principle" as the root of all evil, and Mill, in his essay on liberty, spoke of Christians as a "low, abject, and servile" lot. But the critical questions to be asked are: how did hedonism shift from an aristocratic bias in the Hellenistic period to a democratic bias in the British school, and where did these men get the ideal of the "greatest good of the greatest number" and the notion of "each to count as one, and no one as more than one"? One can imagine the horror of an Epicurus or of a Lucretius, had either survived to see this development of his thought. What has happened is that Christian idealism has infected even hedonism, and that, as Mill very well knew, it has constrained hedonism to contradict the logic of its own premises. If the utili-

tarian tradition has made a significant contribution to legal and political institutions, this is due not merely to its affinities with Newtonian mechanics and to its serving as the tool of a militant middle class, but also to its instinctive acceptance of historic Christian ideals of love and of human brotherhood.

However, the best example in our own times of the humanist ethic's serving as a tool of a religious ethic lies in the teachings of John Dewey. Once more we have the agnostic repudiating the religious roots of his idealism, while sedulously cherishing the fruits. To the cultural historian it must be abundantly clear that John Dewey was a classic type of the secularized Protestant. Indeed, one might borrow a label from Santayana, and call Dewey our "Last Puritan."[2] His affinities with the orthodox tradition of Protestantism appear in his experimental rationalism, in his passion for education, in his evangelical devotion to experience, and in his radical individualism. His affinities with the ultra-liberal tradition of Protestantism appear in his belief in tolerance, his inability to appreciate the evil in human nature, his tendency to substitute aesthetic ecstasy for religious ecstasy, his anticlericalism and antisupernaturalism, and his rational utopianism. John Dewey's ethical idealism is strong precisely where it is congruent with the Protestant heritage; it is both feeble and superficial when it repudiates the power of faith and the more realistic insights that belong to the Christian tradition.

Indeed, we must get over the fiction of an autonomous reason. Even in the physical sciences reason operates within the framework of a faith, of a vision; it is the instrument of a perspective, the tool of a point of view. Its task is both to criticize and to implement the basic perspective; but when the faith fails, reason is impotent; when the vision dims, reason is blind.

III

The only consistent secular moralities are those of pleasure and of power.

If we classify ethical traditions by the values which they make paramount, we may say that there are five main traditions, which glorify these values: pleasure, power, duty, wisdom, love.

The hedonistic tradition, which extols pleasure, and which defines happiness as a preponderance of pleasure over pain, is consistently atheistic or agnostic. Lucretius does grant that there may be some gods somewhere, but he is sure that they are remote and uninterested in human affairs, and that their sole concern, like good Epicureans, is cautiously to enjoy that modicum of fun which prudence may permit. Bentham, Mill, and Spencer are agnostics. But the British utilitarians are significant in illustrating how hedonism loses its internal harmony when it attempts to take on humanitarian ideals. The sensitive soul of John Stuart Mill was well aware that his philosophy could not really bridge the gap between a "pig satisfied" and "Socrates dissatisfied." The pathos of Mill was that he yearned after the dissatisfied Socrates, without being able to allow to himself either the faith in God or the faith in immortality which sustained a Socrates.

The other consistent secular morality is that of power. The tradition begins with Thrasymachus, as portrayed in the first book of Plato's *Republic,* carries on with Machiavelli, and then with Hobbes, and comes to a sort of climax in Nietzsche. There is a straight line from the sophist who argues that justice is merely the "interest of the stronger" to the evangelist of the Superman who pours contempt on pity and compassion and glorifies the unbridled Will to Power. Perhaps the essential

in the doctrine of human nature is best stated by Hobbes: "I put for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death."[3] The ethics of power is harmonious only when it sticks to Machiavelli's symbols of the lion and the fox. Once it asks the realistic, empirical question, "Who have been most most powerful men on earth?" then even an agnostic like Bertrand Russell is constrained to turn from force and fraud to science and religion, and to name Galileo, Gotama the Buddha, and Jesus the Christ as the men of greatest power in human history.[4]

The other ethical traditions have always put their highest values in some sort of religious context. The ethics of duty may, indeed, become subordinate to an ethics of power, as in the Spartan and the nazi patterns, but in its noblest and most potent manifestations—Stoic, monastic, Puritan, and early capitalist—it is always deeply religious. The ethics of wisdom, in its great classical expressions as found in Socrates, Plato, Aristotle, and Spinoza, is invariably related to some kind of belief in God and in immortality. It is only the lesser humanists who think that wisdom can flourish without faith. The ethics of love is distinctively religious in character: mere philosophers do not comprehend love, and when they do try to talk about love, it is only to etherealize it as in Plato or to degrade it as in Schopenhauer. When the positive ideal of love—creative, sacrificial, and redemptive—gets watered down into something called compassion, as it does in Hinayana Buddhism (and in Schopenhauer), it is compatible with simple humanism. But when it moves back toward a more vital and outgoing ideal, as in Mahayana Buddhism, it immediately resumes all the furnishings of heaven and hell, of gods, and of immortal souls.

There are good reasons, of course, why the ethics of pleasure and of power should be atheistic or agnostic. It is absurd to think that gods should put men on earth to fulfil ends that are so trivial or so evil. And it is preposterous to think that a creature made only to cherish sensations of pleasure, or to sate his lust for power, should have an immortal soul. The ethics of pleasure and of power are egoistic and introverted. But when men have been devoted to wisdom and to truth, when against inclination they have obeyed the stern summons of duty, when even at the cost of the cross they have followed the commandments of love, they have known that these things could have meaning only within the context of religious faith. The ethics of wisdom, of duty, of love are sacrificial, extroverted, self-transcending.

If we are to have morality without religion, then pleasure and power are its ends. Let the honest legislator consider what constitutions he may erect on such foundations, and let him do so without sneaking in the ideals of a Hebrew-Christian faith which he must logically reject both in theory and in practice.

IV

Purely secular political ethics is totalitarian.

Here we must invite those who extol the Renaissance to take their Renaissance neat, without adulterating infiltrations of the Christian ethic. Actually the great achievements of the modern world come from a blend of the civilizing influence of the Renaissance with the idealism and the vision of the Hebrew-Christian heritage. This gives us Michelangelo in art, Shakespeare in literature, John Locke in political theory. But the Renaissance, when it is strictly secular, gives us the political doctrines of Machiavelli, Hobbes, Rousseau, and Marx.

We may applaud Machiavelli's consistency in logic if we deplore his failings as an empiricist when he tells us that Christianity makes bad citizens and poor fighting men. Obviously Christianity has yielded many excellent citizens and many splendid soldiers. But Machiavelli realized that the teaching of love was incompatible with his teaching of force and of fraud, and in his view of history the Athenian jury was victor over Socrates, Caiaphas was victor over Christ. Machiavelli's *The Prince* is important because it gives us the first clear statement of the theory of political practice which can entrance the immature minds of a Hitler or a Mussolini, which believes it is engaged in *Realpolitik* when it is being most fantastically visionary, which likes to boast of its hardheaded respect for the facts when even the facts under its nose (the career of a Cesare Borgia) contradict its most cherished illusions, and which believes that its insight is profound and permanent when it is demonstrably superficial and short.

The political ethics of power produced its first totalitarian classic in Hobbes's *Leviathan.* The second classic was Rousseau's *Social Contract.* First let us remark that Hobbes and Rousseau saw much better than any Marxian the proper uses of religion in the totalitarian state. Machiavelli and Nietzsche hated religion as an opiate. Hobbes and Rousseau saw that it could be a useful opiate within the totalitarian context, and in this respect present communist practice follows them rather than Marx. One of the most fascinating sections of *The Leviathan* is Part III (developed further in the last chapter of Rousseau's *Social Contract*), where this explicit atheist and materialist indicates how religion and the church are to be exploited within the totalitarian system. It is strangely moving to find Hobbes, like a sectarian fundamentalist, coming out in favor of

the "simple gospel"—a very simple gospel, indeed, which has been divorced from all social ethics, and which refers the consummation of all religious meanings to the next world so that this world may be completely under the dominion of the secular state.

The difference between Hobbes and Rousseau is that Hobbes gives us the tough-minded, realistic version of totalitarianism, while Rousseau gives us the high-minded, idealistic version of the same. For this reason the writings of Rousseau have deceived several generations of political scientists into believing that he was a champion of democracy. But when we take a good look at the *Social Contract,* along with the two *Discours,* and also with the *Considérations sur le gouvernement de Pologne,* we can discern the important signs: the disdain for private property, the contempt for due process of law, the disregard of minority rights, the insistence upon a single political party, the subordination of the church to the state, the doctrine of a sovereign people not under the sovereignty of God, the theory of an initial lawgiver of superhuman proportions, the distinction of the general will from the will of all which is determined by mere majority vote, and the plain statement that the recalcitrant members of this co-operative community must at last be "forced to be free." All of this business is flavored, of course, with much palaver about liberty and equality. In our own day we can at last recognize the meaning of this sort of democracy: it is that horrible caricature of the real thing which is called a "peoples' democracy."

Karl Marx is akin to Rousseau in the weird blend of anarchist illusions of individual freedom with a collective interpretation of society. But he has a deeper kinship with Machiavelli, in that his real concern is with the mechanics (and with the metaphysics) of seizing

power. The fact that Marxism in practice should finally evolve into Machiavellianism is no mere accident of history. As Reinhold Niebuhr has pointed out in a brilliant essay,[5] the seeds of the Soviet power system are there in the idea of a dictatorship of the proletariat, in the concept of a revolutionary act which should abolish all sin in society by abolishing capitalism, in the expectations of the utopia which is to come, and in the pseudo-scientific dogmatism that pervades the Marxian teaching.

Today's judgment on the secular political ethics of power is still the judgment that was expressed long ago by Plato's Socrates and by the Hebrew prophets. Power that is unaccompanied by wisdom and by justice must destroy itself. The lack of justice breeds internal disharmonies and conflicts, and the lack of wisdom causes the power state to mistake for its own interest what is really contrary to its interest. Supreme power belongs only to God, and any human society that should attempt to seize that supreme power must finally fall into the ruin and the confusion of Babel.

V

A humanist ethic tends to reach for a religion.

Because a humanist ethic is inherently in unstable equilibrium, it exhibits two tendencies toward its own destruction. One is the tendency to develop into a religion; the other is the tendency to lose its ethics. The first tendency is our concern in this section.

Classical hedonism in its evolution from Epicurus to Lucretius becomes an explicit and well-rounded soteriology. It addresses itself to the question: "What shall we do to be saved?" In Lucretius' great poem, Epicurus is hailed from time to time as the Redeemer of man-

kind, who has liberated us not from sin but from superstition, so that "we by his triumph are lifted level with the skies."[6] Now at last we know the true nature of reality: it is nothing but atoms swirling in the void, and our business here is the cultivation of peace of mind through the prudent pursuit of simple pleasures. This is religion as an opiate, not for the people, but for the intelligentsia. Its general tone is indicated, not altogether fortuitously I believe, by the fact that the poem which begins with an apostrophe to Venus ends with a description of a great plague. There is also more than a casual significance in the fact that Lucretius addresses his verses to his military friend Memmius, so that here the apostle of pleasure converses with the apostle of power in a pleasant fellowship of enlightened futility.

Modern hedonism, when it became known as utilitarianism, also reached for a religion in the great *summa* which is the philosophy of Herbert Spencer. The basic reality here is force and the law which governs its evolution and devolution in eternal cycles. Now we learn that pleasure-giving activities are identical with life-giving activities; and, in spite of present tensions between the individual and society and between the individual and his environment, we look forward to the blessed day when egotism and altruism shall perfectly supplement one another and when our internal relations shall be perfectly adjusted to our external relations. Instead of an apocalyptic hope we now have the faith in progress; and, instead of being enslaved by superstition, we are once again liberated by "science." The metaphysics of hedonism in Herbert Spencer is different from that in Lucretius, but it meets the same needs of religious faith.

A more striking example of a humanist ethic's evolv-

ing toward a religion is found in Auguste Comte's positivism. Comte intended to abolish both the theological and the metaphysical prejudices of mankind and to substitute for these the scientific regard for fact. But since he had gone farther than even Lucretius had or Spencer would in abolishing a metaphysics, he found it necessary to establish, quite baldly, a new religion—the Religion of Humanity. Now we are to worship Mankind instead of God. In order to make his cult effective, Comte boldly borrowed from the Roman Catholic church every apparatus of liturgy and of saints' calendars which he could adapt to his purposes, and even elaborated a sort of perverse secularized Mariolatry in his glorification of the Mother-image. The fact that, whatever men may worship, they can never manage to worship Humanity was something that easily escaped the notice of Comte, in his characteristically humanist conviction that true humanity was, of course, symbolized by fellows like himself. For had not the eternal logos at last become incarnate and incandescent in his own person and in his own teaching?

That the communist movement in our times must be understood essentially as a religion is already a commonplace. Above all else it is a soteriology, a system of salvation, which captures the diseased imagination of sick peoples with its promise to abolish the evils of capitalism and imperialism, and to liberate them into a paradise of freedom and of plenty. It has its holy book in the gospel according to Marx, its roster of saints and martyrs, its Vatican in the Kremlin, its missionaries in every land, and its scribes and theologians who expound the mysteries of the dialectic and make palatable to the layman its inscrutable and often contradictory decrees. Better than any historic faith it has exploited with diabolical ingenuity the old sacrament of penance, and,

with its brain-washings, has persuaded many a sinner to put off the old capitalist-imperialist Adam and to put on the New Man in Marx.

If these four instances I have given are truly representative samples of the tendency of a humanist ethic to acquire a religion, then our problem is somewhat simplified. If we are going to have a religion, anyway, then let us base our ethics on a religion which can properly enshrine the values of justice, of righteousness, of truth, and of love. And we may sharply question what may in the end be the merit of these allegedly "scientific" faiths which—in place of the Kingdom of God—give us with Spencer the ideal of an industrialized capitalism, or with Comte the vision of a rational fascism, or with Marx the reality of communist totalitarianism; or which—in place of Spinoza's intellectual love of God—invite us with Lucretius to the intellectual love of pleasure.

VI

A humanist morality tends to lose its morals.

We have said that the radical contradictions at the heart of a humanist ethics exhibit themselves in two ways. One is in the tendency of the ethics to turn into a full-fledged religion. The other is in the tendency to lose confidence in the moral principles which it first set out to establish.

Even in classical hedonism it is possible to discover the dissolution of the belief in pleasure. In the character of Aristippus there is a superb poise which is based on pure flippancy with regard to the ordinary values of life, but a pernicious anemia of the spirit has already set in with the prudent calculations of Epicurus. It is foreshadowed in the teachings of the Cyrenaic Hege-

sias, called the "Persuader-To-Die," and it comes to a climax at the end of the third book of Lucretius with its eloquent rhapsody on death. The hedonists had discovered at last that the more they pursued pleasure the more they found of pain; and their deeper yearning for *ataraxia*—usually translated as tranquillity, but today cultivated as peace of mind—finally brought them to the realization that man's only peace is found in the grave. And for many an Epicurean suicide becomes his pathway to pleasantness.

If classical hedonism lost its ethics by sinking down to despair, modern utilitarian hedonism lost its ethics by attempting to rise to heroism. There is, indeed, an irreducible incompatibility between a heroic ethics and a hedonistic ethics.[7] The soul of John Stuart Mill was torn by this dilemma. His intellect told him he must be a hedonist; his nobler nature told him he should live like a hero. And be it said to the credit of Mill that, unlike lesser apologists for his faith, he never tried to argue that Socrates drank the hemlock, or that Christ went to the cross, because it made him happy. Between the blessedness, *makaria,* of the saint and the martyr and the happiness, *eudaimonia,* of the hedonist there is an infinite gulf. It is for a good reason that Marcus Aurelius tells us to do our duty "unspotted by pleasure and undaunted by pain"; that Plato depicts Socrates in his last moments as expressing a devotion to wisdom and to truth regardless of whether pleasure or pain or any other thing may enter into it; that the synoptic Gospels, more honest here than the Gospel of John, portray Jesus in great spiritual agony in Gethsemane, so that the sweat stood out on his brow like great drops of blood. To live like these men, for duty, or for wisdom or for love, is not the same thing as to live for pleasure and for happiness.

However, the most dramatic instance in history of a humanist morality's losing its morals lies in the story of communism. In Karl Marx the ethical impulse is wedded to the power impulse. It was the intention of Marx that a revolution of power should serve the ends of social justice. But Marx repudiated the faith of his fathers which made it possible to keep power under the discipline of justice. The crucial difference between socialism and communism lies right here. Socialism held onto the historic Hebrew-Christian values of justice, liberty, and love, and the leadership of this movement in the United States, in Britain, and in the Scandinavian countries was often distinguished by men of a noble religious faith. The Communists, on the other hand, accepted the full logic of Marx's materialism and anticlericalism. They had already disposed of God and of his church; in due time they were to rid themselves of the residue of a Hebrew-Christian ethic that was to be found even in Marx.

From the point of view of morals the evolution of communism is from Marxian idealism to Machiavellian cynicism. The ethical element in Marx's teaching is actually of little relevance today in explaining the tortuous maneuvers of Soviet policy. Of course the grand old phrases are still kept for window-dressing, to delude sentimentalists and to seduce intellectuals. In this transvaluation of values the Communists have been shrewder than a Nietzsche. The familiar words are still there, but their meaning is now the exact opposite of what it once was. Justice becomes an iron injustice, liberation signifies a new slavery, the equality promised men turns out to be an equality in bondage, a peace offensive is a maneuver toward war, peoples' courts are to flout due process of law, and a people's democracy is a fancy name for tyranny. The decline in the moral

prestige of the communist gospel is evident in at least two ways. Even some desperate Asiatic peoples—as witness a recent election in India—are beginning to see through the hypocrisy and the pretense. And the missionaries of communism, like their masters at home, are losing their skill at high-sounding moral exhortations, and are content increasingly to settle down to the devious manipulations of pure power politics.

As for the humane humanist—who may insist that he cherishes wisdom, rather than either pleasure or power—two things are to be said. First of all he does this in defiance of the great teachers in his tradition, all of whom relate wisdom to some context of religious faith. But what is more crucial, the devotion to wisdom, when not sustained by some great religious vision, soon degenerates into mere calculations of prudence. And at this point it becomes either with Lucretius the prudent pursuit of pleasure, or with Machiavelli the prudent conquest of power, and shortly expresses the self-annihilating logic of these two forms of a humanist morality.

VII

Humanism has inherent inadequacies for ethics.

We have already seen how humanism exhibits its internal contradictions by a twofold tendency: a tendency to evolve into a religion, a tendency to lose its morals. We have now to inquire what may be the nature of those internal contradictions.

The basic difficulty for humanism lies in its ultimate object of devotion. That object is humanity, or human values. The trouble is that when the humanist turns to science for a report on the nature of human nature, he gets a picture which can hardly inspire him to religious ecstasies. Science as we have it today depicts man as

a machine, as a puppet of heredity and environment, as a higher form of animal, as a creature of wayward drives and impulses, as a beast of prey—in brief, as anything but a truly human being. The two great classical affirmations about human beings—the Greek affirmation that man has a mind which makes him akin to the gods, the biblical affirmation that man has a soul which makes him a child of God—are not a part of the teaching of science. Indeed, all of our prevailing psychologies portray man as a being who is slightly subhuman. It is only the faith of the great historic religions, which affirm that man can be something more than man, which also makes it possible to believe that man is at least a man.

Even more than science our ordinary observation of life makes it impossible to accept humanity as a final object of devotion. Inevitably we must run up against man's inordinate capacity for evil. If the problem of evil makes it difficult for some people to believe in God, it makes it even harder for the humanist to believe in man. In our own time we have seen a nation like Germany, which used to be the center of all the civilized arts of the West, turn suddenly to nazi barbarism. We have seen what appeared to be a great movement for social justice—Marxism—corrupted into the most terrible and efficient tyranny man has ever known. We have seen the development of science, which for the classical humanists bore all our hopes for enlightenment and for welfare, presently confront us with the possibility of the total destruction of the human race. It is, indeed, difficult to idealize a creature who, even when he sets out to do the most good, can turn his efforts to utter evil. Religious faith has its historic resources for coping with this fact of evil, but humanism has none, and can have none.

Because humanism rejects the true God, and because its own god invariably fails, it always turns to secular soteriologies which offer an illusory hope of redemption. In our own day these soteriologies are typically collectivist in character. They take the form of nationalism, of fascism, or of communism. Indeed, Reinhold Niebuhr offers the generalization that humanism oscillates forever between the extremes of idolatry and atheism. At one moment it has some magical scheme of salvation, which fills it with the most magnificent utopian illusions. The next moment it is cast down into bitterness and despair. In the phase of atheism, or of disillusionment, its judgment about the value of life is summed up in the words of Ecclesiastes, who, having tried in turn all the pleasures and powers that life had to offer, came to the conclusion, "Vanity of vanities, all is vanity!"

The pragmatic consequence of the inadequacy of its object of worship is that humanism is unable to generate a consistent sacrificial devotion. No significant system of values can be maintained in this world unless individuals are willing at times to sacrifice themselves for a greater good. If that greater good is simply humanity as we know humanity, then the wise egotist will certainly deny himself the honors of martyrdom. It is true that the collectivist humanisms of our day have been able to generate for a while the spirit of sacrifice. We used to be told a great deal about how people would give up their lives for the communist cause. It is interesting, however, that these stories begin to disappear, and that the concern of the good Communist now is how to make other people suffer rather than to make a sacrifice himself. To be sure, the sacrifices continue—as men die not in faith but in fear, not freely but by compulsion, not in devotion to an ideal but in terror

of a tyrant. This is our martyrdom à la mode, the martyrdom of a prescribed heroism, of a coerced sacrifice. It is martyrdom without faith, without hope, and without love. To have to die in such a manner can be only somewhat less terrible than to have to live in such a manner.

The inability of the most enlightened humanist to pay the supreme price in defense of his ideals accounts for the fact that in a crisis the humane humanisms always succumb to the more virulent and violent humanisms. In Nazi Germany it was the intelligentsia who yielded first to the blandishments of Hitler, while the most stubborn resistance came from those Jews, Protestants, and Catholics who would not compromise with the new idolatry. Curiously enough our chief witness to this fact is Albert Einstein, who never associated himself with formally organized religion, but who was sufficiently impressed by the heroism of religious folk in Germany to record the fact and to express his humility before it. Indeed, when man plays the beast or the angel, there is nothing more impotent before his fury or his ecstasy than the wise counsels of a civilized prudence. An evil faith, or no faith at all, is overcome only by a great and noble faith; it is not subdued by reason and by science.

Conclusion of the Matter

If the argument in this paper has been overwhelmingly negative in character, it is because the question that was put to us required such a negative answer. It may be in order, however, briefly to indicate those elements in religious faith that give a positive undergirding to morality, and without which no worthy moral ideals can be sustained.

First of all, morality needs an objective point of reference that is stable and secure. The historic alternatives for this have been God, nature, humanity, society, the self. Nature is a norm that is both inadequate and uncertain. Matthew Arnold expressed this inadequacy when he wrote:

> Know, man hath all which Nature hath, but more,
> And in that *more* lie all his hopes of good . . .
> Man must begin, know this, where Nature ends;
> Nature and man can never be fast friends.
> Fool, if thou canst not pass her, rest her slave![8]

The uncertainty of nature as a norm is indicated when we ask whether we mean Newton's, or Darwin's, or Einstein's nature, Aristotle's or Rousseau's human nature. Humanity, as I have argued above, when defined by science or when reported by history, gives us little if anything to which to tie our better aspirations. When we turn from humanity to society, we are already becoming cynics, because we must mean our society as against other societies; and when, sick even of that society which is ours, we turn to the self in yearning for a fulfilment that is purely personal, then we have fallen into utter moral relativism. The ethics of relativism has its humane phase in a prosperous and comfortable society where we can indulge the luxury of mutual toleration; but, when life soon becomes competitive and tough, then this ethics appears, in effect, as the old and evil teaching that might alone makes right.

When we see God as both the source and the norm of our morality, then we have a point of reference which makes possible the discriminating inclusion of the other points of reference. This God who comes to us from the specifically Hebrew-Christian revelation

lays down standards of justice, righteousness, love, and truth, which are partly available to us as a law written in the inward parts, but which also transcend our human efforts and stand in judgment on all the partial achievements of man. God is, indeed, the creator of nature, and gave it to man for man's enjoyment and use, as well as for the revelation of his own power and glory; but he never intended nature as a norm. Humanity, indeed, was made in God's own image, but it is also a fallen humanity; and we must look to God to know what is truly human in humanity. As for society and the self, they, too, are among the orders of creation, but the idolatry of the first yields totalitarianism and the idolatry of the second yields anarchistic egotism: the fulfilment of the one as of the other lies in a divine dispensation which cannot find its consummation in history.

This brings us to the second element in religious faith which undergirds morality—the belief in a life-to-come. As Toynbee has ably stated the case, there are three alternatives here, and not just two.[9] One is a belief in the reality only of this world; a second is a belief in the reality only of the next world; a third is a vision of this world as only one province of a Kingdom of God which also includes another world. A consistent ethics of this world, as I have tried to show, is an ethics of pleasure and of power. On the other hand, an ethics which takes seriously only the next world is an ethics which must finally hold in contempt the moral responsibilities and the social institutions of this world. When religion offers this kind of teaching, then religion is indeed an opiate. It must be said emphatically, however, that the radical divorce between this world and the next world is Hindu and Buddhist but not characteristically Hebrew-Christian.

The gist of the Hebrew-Christian vision is that it simply sees this world in a larger setting than is allowed in a purely scientific account of affairs. The horizons of this vision sweep out in an arc that makes a thrust beyond the limitations of space and of time. The life-to-come is coherent, though in dialectical tension, with this life. What is done here has its fulfilment there; what is done now has its consummation then. Dante saw all this clearly in his *Divine Comedy*. Indeed, the Hebrew-Christian faith has been a dynamic for social reform more often than it has been an opiate. Certainly the atheistic Hobbes understood this quite clearly. He had right before his eyes the radical intransigence of Puritans, Independents, Presbyterians, Levelers, and Diggers, in their fierce determination to reshape the institutions of society. He could see very well that a faith in a life-to-come could serve as a powerful motivation for the necessities of this present life. Hobbes therefore was not reporting a fact that religion is an opiate; he was expressing a pious, totalitarian hope that religion might be converted into an opiate, so that a purely secular polity of pleasure and of power might hold sway undisturbed.

Besides the faith in God and the faith in a life-to-come, religion undergirds morality with the power of conviction that comes from our having seen the word made flesh. It is not in order here to discuss the full theological implications of the doctrine of the Incarnation, but its ethical implications may not be by-passed. It is well enough for philosophers to *discuss* great moral principles; it is well enough for prophets to *speak* the commandments of God: but it is not until men have *seen* the human embodiment of all these abstract principles and commandments walking in their midst, actually living in accord with what has been taught, sharing

in human joys and sorrows, and redeeming life with a vision of possibilities beyond what ordinary experience offers—it is not until men have *seen* this that they arrive at conviction, that they really believe, that they are enabled so to act. So it is that all the great religions, unlike systems of philosophy and of law, present to us a person, or persons, who may be the incarnate moral law, whether it be a prophet like Moses or Mohammed, or a whole series of avatars as in Hinduism, or a unique and superlative revelation as in Gotama the Buddha or Jesus the Christ.

Then whatever laws or constitutions we may have, if they are to be worthy of the best that is in humanity, if they are not to be a legal enactment of the human being into the lion, or the fox, or the pig, they must see man as under the dominion of a just and merciful God, as having a destiny that reaches beyond the inconclusive considerations of this present life, and as measuring up to the possibilities that are revealed to us in one who was proclaimed to be both Son of God and Son of Man.

1. Niebuhr, Reinhold, Faith and History 189 (1949).
2. Cf. Fitch, Robert E., John Dewey—the "Last Protestant," 7 Pacific Spectator 224 (1953).
3. Hobbes, Thomas, The Leviathan, Pt. I, Ch. XI, p. 49 (Everyman ed. 1914).
4. Cf. Russell, Bertrand, Power (1938).
5. Niebuhr, Reinhold, Why Is Communism So Evil? in Christian Realism and Political Problems Ch. III (1953).
6. Lucretius, The Nature of the Universe Bk. I, p. 29 (Latham tr.).
7. Cf. Fitch, Robert E., Heroism, Hedonism, and Happiness, 38 Hibbert Journal 33 (1939).
8. Arnold, Matthew, In Harmony with Nature, from a sonnet in one of the Early Poems.
9. Toynbee, Arnold, The Meaning of History for the Soul, in Civilization on Trial Ch. XIII (1948).

CAN THERE BE LAW WITHOUT MORALITY?

Arthur L. Harding

In seeking to answer the question whether there can be law without morality we are at once confronted with a problem of definition. Both "law" and "morality" are terms of many meanings which countless scholars have sought to define. Some of the definitions which have been evolved would make our discussion on this occasion pointless.

Thus if we define "morality," as some of our modern pragmatists tend to do, to include all manner of rules, standards, principles, or norms by which men regulate, guide, and control their relationships with themselves and with others, we have answered our question. Morality as so defined necessarily includes the entire body of law. Or, if we give to "morality" some very narrow definition such as Christian ethics, the answer again is obvious. We know that non-Christian countries have institutions which are entitled to be called law. In this connection of course we should not overlook the possibility that in such countries the legal institution may

rest upon ideas which the Moslem, Jewish, and other great religions hold in common with Christianity.

Similarly, there are those who would define "law" as embracing all rules, principles, standards, or norms which men feel to be *obligatory* in their relationships with other men. A good deal of morality is necessarily enbraced in such a definition. At the other extreme are those who would limit the field of law to a set of logical propositions. Perhaps, though not necessarily, morality is excluded from such an area.

It would appear then that we must begin with an attempt to define terms. While the present occasion is not one which would permit exhaustive analysis and precise definition, we must at least provide a descriptive definition, one which would indicate what generally or ordinarily is meant by "morality" and by "law."

The Nature of Morality

It would seem clear that human conduct doesn't just happen. Each human act involves some sort of choice among alternative courses of conduct found or believed to be within the capabilities of the individual actor, or at least between doing or refraining from doing the particular act. Whether made consciously or subconsciously, this choice reflects the will, or the reason, or both the reason and the will of the individual actor. If the response is a reasoned one, there is a reference to something outside the mind of the subject, and the course of conduct is chosen on the basis of its conformity to what is considered "right," or on the basis of the extent to which it would contribute to some goal or purpose or "good" of the actor, or perhaps on the basis of what the actor knows the community expects of him. Even if the choice is not a reasoned one, there

is a point of reference outside the immediate situation. The response or choice may be a learned one, based upon similar experiences in the past, in short a habit. Even when we are dealing with such elemental things as the "instinct" of self-preservation or the drive to generative reproduction, we still find choices based upon outside points of reference. Men die because they believe that thereby they contribute to some value greater than the individual life, or perhaps because they feel obliged to sustain a tradition of brave or manly conduct. Men kill themselves because they have come to believe that therein is found the road to some trans-earthly reward, or bliss, or peace. Others die at their own hands because they have become confused or frightened at their inability to make choices of earthly conduct. With regard to the generative drive, it seems sufficient to note that men, even uncivilized men, do not engage in sexual intercourse at every opportunity.

The study of man's conduct has many facets, each of tremendous importance. First there is the entire field of psychology which would delve into the mechanics of the reaction of man's mind to external stimuli, which would discover what is meant by human will and how it is manifest, which would expose the actual operation of human reason. And then there is the problem of knowledge; when do men "know" a thing to be true? For an empiricist, the problem of knowledge is two-fold. There is not only the problem of epistemology, the science of the true basis or essence of knowledge, but also the problem, essentially psychological, as to the actual basis on which man, with all his weaknesses and shortcomings, is willing to accept something as true. Empirically, the basis of human acceptance of truth may be a much more significant datum than is

the epistemological conclusion as to the essence of knowledge.

But since the human will and human reason make reference to externals in making choices, the study of human conduct must embrace the study of those external points of reference. It is with this task that we are concerned today. These are essentially techniques or patterns or standards of human conduct which the subject is taking into account in selecting his own course of action. We must ask, then, on what are such techniques or patterns or standards based? At this point it would seem feasible to divide these external references into five principal categories.

First, there is the learned response or habit, where the actor makes a choice identical with that which he has made previously under similar circumstances. It must be noted that this is not an entirely independent category, because there remains the question of why the particular choice was made in the first instance. That the initial choice has been repeated on intervening occasions is also some evidence of its conformity to some other point of reference.

Secondly, there is custom, where the actor makes his choice in line with what he knows others have done in similar circumstances, where the subject probably seeks to merit the approbation, or at least to avoid the condemnation of his fellows. There remains, of course, the fundamental question of how the custom came to be established. Again, the growth and persistence of the custom tends to establish its conformity to some other standard.

In the third place, we should note manners, or what used to be called the rules or laws of fashion. Here courses of conduct are followed for no reason except that they make coexistence of men in society more

agreeable, because they serve to avoid unnecessary conflict and friction, because they contribute to order and peace. A good part of our standards of conduct fall into this category. It should be noted, however, that the entire category is based upon a value judgment, that order and peace are "good" in human society.

Fourth, we note those techniques or standards which are deemed to be "good" because they in turn tend to bring about a desirable result, to be for the "good" of the society or of the individual. Here we would find Bentham's principle of utility with its ultimate goal of human happiness. Here also we would find Marx's dialectical materialism and its ultimate goals of an economic egalitarianism and of the dictatorship of the proletariat. Also to be subsumed would be contemporary American standards based upon an ideal of free economic enterprise, as well as the entire gamut of idealized civilizations ranging from Plato to Pound.

Finally, there are those patterns or techniques which are considered to be "right" because of their conformity to what is accepted as an ethical principle. While the immediate sources of such ethical principles may vary, there is an underlying assumption of the existence of a standard of right and wrong which transcends human demands and human frailties, perhaps of a standard which transcends earthly existence itself. Here of course we would encounter most of the Natural Law theories which have been developed, as well as such metaphysical devices as Kant's categorical imperative and Stammler's theory of Just Law.

Briefly, I would say that the distinguishing characteristic of morality is that it is concerned with those standards and patterns of conduct which are labeled "good" or "right," to the exclusion of those which more properly are labeled as habit, or as custom, or as man-

ners. To this statement of course I must add two observations. First, there is great pluralism in the terms "good" and "right." The concepts may derive from the highest idealism, or the meanest hedonism, or the basest economic greed. The shortcomings of the baser concepts of "good" in the face of the transcendental concepts of "right" have been well stated by Mr. Fitch, and I cannot improve upon his statement. Here we are discussing a human institution, and we must consider man weak and sinning as well as man strong and virtuous, acting pursuant to a reason created truly in the image of God.

We must note also that the boundary between morality on the one side and custom, habit, and manners on the other is mobile, and that the categories themselves are fluid. Individual habit may become custom. Custom and manners tend in time to become identified with the necessary, and to be labeled as "good" or "right." Certainly our ideas of individual and social "good" tend to change over the years. Even in those areas of ethical "right" where it is sought to rely upon a Stoic cosmology, or upon the plan or reason of God, it is necessary to admit that human knowledge of the cosmos and human understanding of and participation in the divine reason may be enhanced and increased by further experience and reflection over the centuries. In short, all standards other than those of the ethical "right" are strictly relative with respect both to time and to environment. While the ethical "right" may be immutable, man's comprehension of it is neither complete nor final.

Morals or Morality

We must note one additional problem of definition or terminology. This aggregate of techniques, patterns,

and standards of conduct to which men refer in choosing courses of action may properly be called "morals." But we are speaking today of "morality." The use of the singular number implies that there is in existence some sort of unifying principle, some underlying frame of reference into which morals may be fitted. Is it possible to speak of a public morality as well as of public morals? Clearly it is impossible to bring such divergent doctrines of morals as those of Rousseau, Kant, Hobbes, Aquinas, Bentham, Marx, Hitler, Hooker, and James Wilson into harmony with any single unifying principle. Looked at in another way, however, these persons exhibit great similarity: each believed that there was a unifying principle and that he had discovered it. Each had his own morality. In this characteristic these men reflected their less able contemporaries. It is fair to say that each individual has more than a collection of morals. He has in addition some sort of underlying assumption or belief of "good" or "right" which in his mind justifies and supports his morals. Not only does he believe a certain action to be "good" or "right," but he also has a belief as to why it is such. It is proper, certainly, to speak of public moralities as well as of public morals. In an empirical discussion of law as a human institution this is as far as we need go. When the individual is acting alone, we look to see whether his individual morality is reflected in that action. When individuals act in concert, we may look to see whether perchance they share a common morality or whether, as is more likely, their individual moralities happen to be in agreement with respect to the case at hand. I use the term "morality" as describing this sort of thing, not as necessarily implying that there is a single unifying concept of right to which all human action is referrable.

The Nature of Law

Troublesome as the definition of morality may be, it is but child's play when compared with the problem of defining law. However, if we are to go farther in our assumed task, we must formulate some sort of working concept of the term. For orientation let us first note two widely opposed ideas.

On the one side we find the several concepts of Natural Law. While these concepts vary considerably in detail, they are based upon certain common assumptions. First, it is stated that the universe and everything in it, including man, is governed by some sort of a basic principle of order, timeless and immutable. This basic principle, often called eternal law, may be derived from the observed order, the scientific cause, in the physical universe, with the result that the eternal law is a sort of Stoic cosmos. Or, the eternal law may be the plan or reason of a personal God, as was taught by Aquinas and Hooker, among others. Second is the Aristotelian proposition that man of all living things is invested with the quality of reason, and that with this reason man has both the desire and the capacity to understand the universal order or the divine reason. Usually it is said that the capacity of man to understand is partial only; that were he capable of full participation he would no longer be mere man but would be very God. It should be noted that Pelagius of old, the rationalists of the eighteenth century, and some of the unbounded natural scientists of today do assume such a full capability. On the basis of these first two propositions, there is erected a third: the concept of Natural Law. Natural Law is reasoning man's participation in the universal order or the divine reason; Natural Law is that part of Eternal Law known to man. Note that this

Natural Law is not a determinist law; it is not assumed that man will follow this law as the sunflower follows the sun or as the dropped object falls to the earth. Rather it is normative, it is a guide; man still has a freedom of choice, a capacity to err or to sin. In religious doctrines of Natural Law there is a fourth proposition. Since man is incapable of a full participation in divine reason, and since God desires that men shall so participate and shall attain salvation, God makes his plan or reason known to man in ways in addition to human reason. And so we have a Revealed Law, with revelation through Scriptures, or through individual religious experience, or perhaps through earthly churches.

On the basis of Eternal Law, as known to man through Natural Law or Revealed Law, man erects Human Law. This Human Law is in two parts. One part represents man's attempt to put into operation in human society the principles of Eternal Law as and to the extent that he understands it. The other part has to do with those things about which nothing is known of the Eternal Law, or which appear to be ethically indifferent. This part of the Human Law, however, is based upon the obvious proposition that human affairs should be orderly, as are all other things in the universe.

The interdependence of law and morality in this scheme of things is obvious. Human Law is undergirded by Eternal Law. This same Eternal Law furnishes the single unifying factor to which morality must be referred. The validity of Human Law depends upon its consistency with Eternal Law. The validity of individual morality depends upon its consistency with Eternal Law. Law and morality are but differing manifestations of the same thing.

ANALYTICAL JURISPRUDENCE

Let us turn now to doctrines at the other end of the spectrum. Typical would be the Analytical Jurisprudence of John Austin, which became the prevailing doctrine in England in the nineteenth century and which has made considerable inroads into American thought in the twentieth. Austin begins not with nature nor with God, but with Hobbes's concept of a human sovereign of unlimited authority. There would be found in society, Austin said, some identifiable individual or individuals to whom all other individuals in the society habitually rendered obedience, and who in turn did not render habitual obedience to any other human person. The analogy to Machiavelli's Prince and to Rousseau's General Will is apparent. Law was simply the aggregate of the commands which that sovereign promulgated to his subjects. Sheldon Amos[1] succinctly stated this doctrine when he defined a law as "a command proceeding from the supreme political authority of a state and addressed to the persons who are the subjects of that authority." To the elements of sovereign and command, Austin adds a third element, the sanction, or that which obtained obedience or compliance by the subject. To Austin this was but the threat of evil which the sovereign was prepared to visit upon the nonconforming subject.

Elaborating upon his definition, Austin distinguished between laws "properly so-called" and laws "improperly so-called." Under the heading of "improper" laws he listed first the laws of physical nature, either on the ground that they did not derive from a *human* superior, or on the ground that they were not addressed to human subjects. Also labeled "improper" was the entire field of manners, fashion, and morality, for the reason that however effective they might be they did not pro-

ceed from an identifiable human sovereign, but from a fluctuating body of public opinion. Natural Law likewise would be eliminated from the category of "proper" law as falling into one of these categories, either as emanating from God or as emanating from public opinion, or as Austin phrased it from positive morality.

But Austin was not done. Even within the area of law "properly" so-called, he distinguished between what he called "law by analogy" and law "strictly" so-called. The label of law by analogy was applied to divine law, for want of a human superior and also possibly for the reason that it could not be demonstrated that men as God's subjects habitually rendered obedience to Him. Also labeled analogy was the power which one individual might have over another as the result of economic, personal, and political compulsions.

What is the net result of such a process of definition? In the first place, Austin eliminates the entire field of legislation, the question of *why* the sovereign issued the command that he did. Further, he eliminates the entire area of voluntary compliance by the citizen or subject. Also, he eliminates the problem of administration, assuming that the commands would be applied in a mechanical fashion by judicial automatons. He based his doctrine upon an unhistoric concept of an unlimited personal sovereignty, a sovereignty that does not exist and could not long exist anywhere in the world. The net result is that we have a juristic abstraction, a sort of mathematical game of given the impossible sovereign and the impossible people who would live under such a sovereign, what would the result be? Even admitting the desirability of logic and certainty and predictability as some of the ends of a legal system, Austin's approach appears to be essentially sterile, notwithstanding that

there are those among us who would seek to have it bear fruit.

THE PURE THEORY OF LAW

Austin's mathematical concept has been revived in the twentieth century by the Pure Theory of Law, perhaps better translated as the Theory of Pure Law, of Hans Kelsen.[2] This theory has attracted a considerable European following and has made progress in Latin America. It has been injected into discussions in this country largely through the fine scholars who came from Germany and Austria in the 1930's. Kelsen begins with an obvious shortcoming of Austin, that Austin's is a philosophy of a static law, that it offers no aid to growth or to lawmaking. Kelsen notes the obvious distinction between the laws of physical nature and lawyers' law. The laws of physical nature are essentially logical "is" propositions: "Given A, then B is." Lawyers' law is a normative proposition: "Given A, then B ought to be." Kelsen set for himself the formulation of a logical science of this "ought-to-be." To develop his logical science it appeared to be necessary first to eliminate the nonlogical elements. The "impurities" must be removed from legal science so that the "pure" law will remain for study. And so begins a process of purification. First, Kelsen accepts the Kantian idea of the irrelevancy of what is to what ought to be. The first purification must be the excision of the "is" of physical nature from the "ought to be" of normative law. And so are excluded the facts and laws of physical environment, of biology, of psychology, and of the "natural" parts of sociology. Necessarily rejected at this step are the logical positivism of Duguit and the theory of social interests of Roscoe Pound.

Having reduced his field of study to the ought-to-be

by the exclusion of the is, Kelsen now must conduct a second purification by the excision of all factors not logical. And so are eliminated all axiological factors, all ordinary value-judgments. Morality, religion, politics, economics, are all cast out. And what is left? Little more than a mathematical abstraction in which Kelsen seeks by logical means to subsume each ought-to-be under some more inclusive ought-to-be, just as the inductive logician of the "is" seeks to subsume each major premise under some more inclusive premise. And so Kelsen seeks back of each norm a more inclusive norm, until he comes to the place where he must formulate the Basic Norm, that norm which undergirds all others. Here he fails. The Basic Norm must be assumed, not established by logic. Kelsen's pupil Lauterpacht has suggested that Kelsen reverts to Natural Law at this point. While this may not be correct, the ultimate resort is axiological and not logical.

Kelsen marks an advance over Austin. He does open up a science of logical possibilities in norms. As Judge Cardozo has pointed out, this is a first step in a creative lawmaking process. But when it comes to making final choices among the possibilities developed, Kelsen's efforts are barren. The point of reference must be to some idea of the "right," the "good," or the "expedient."

These analyses of Austin and Kelsen are directly pertinent to our basic inquiry. Here we deal with two deliberate and able attempts to exclude morality from the field of the law. Law was to be based in one case upon a concept of political sovereignty, in the other case upon an ideal of logic. Both came ultimately to an axiology, to a moral judgment. Kelsen came to something resembling Natural Law. Those who sought to use Austin creatively found themselves ultimately relying upon Bentham's utility principle of the greatest indi-

vidual happiness to the greatest number. The inability of these two to exclude value-judgments permits one to ask whether it is even theoretically possible to do so.

A Sociological Concept of Law

If we are to pursue our inquiry into the relationship of law and morality much farther, we must formulate a concept of law lying somewhere between the two extremes suggested. First, we must focus our attention upon law as a human institution. Even if we accept the Natural Law thesis which would fix the roots of both law and morality in the Eternal Law, there remains the purely practical question of how the precepts of morality become identified with the precepts of law. The Natural Law theories recognize a category of Human Law as distinct from Natural Law. At least part of the Human Law may deal with things to which the Natural Law is indifferent. Since man is free to choose, is deficient in understanding, and is free to err and to sin, Human Law is subject to error. Even in those areas with which the Natural Law is concerned, it may be that Human Law is inconsistent or incomplete. By Natural Law standards Human Law may be valid or invalid. A proper inquiry is how it becomes so.

If we are to consider law as a human institution, it is equally important that we insist that it is human. To reduce law to a verbal formula, or to a depersonalized collection of verbal rules, is to remove the inquiry so far from actuality as to make any study worthless.

If it is important that we consider law as a human institution, it is also important that we avoid excesses in this direction. Two such excesses appear from time to time, and should be noted. One is the point of view popularized by the historical jurists of the nineteenth century. To the extremist of this type law was some-

thing which had to develop in the experience and development of a people, something which reflected the essence or spirit of that people. In its early stages this doctrine assumed some sort of Hegelian philosophy of history, of the history of a people as the unfolding of some sort of foreordained idea or order. Later interpretations adopted a Darwinian emphasis, with the survival of a doctrine or institution accepted as sufficient proof of its validity. In either event, the historical doctrine was deficient in its failure to recognize the capacity of men to create law.

The other excess is the tendency of some of our current crop of legal realists to define law solely in terms of judicial decision—to define law as the result to be reached in a particular case "and nothing more." Extremists in this camp would deny that the verbal formulae stressed by Austin have any appreciable effect upon the outcome of the action, and would stress that the administrator reaches his decisions on some subjective basis and employs the verbal formulae only to give an appearance of verity to the result.[3]

I would suggest that we approach the problem in the following manner. Law is a social institution. It is an institution created by men living in a political society whereby the organization and authority of the political state are employed by men to order the society and to settle controversies between individuals, or between the individual and the state. Law, however, implies more. This ordering and adjudicating is to be done on the basis of standards or formulae of general application promulgated in advance. What I am suggesting is that we should consider law not in terms of source, nor in terms of form, but in terms of the functions which it performs in the society.

If we consider law functionally as a social institution

we find ourselves concerned with three principal aspects. First, how and by whom and on what basis are the standards of general application formulated? Secondly, what is the nature of the sanction; what is it that induces the individual subject or citizen to conform to the standard set? Finally, on what basis and in what manner are the standards to be applied; what is the actual basis of law administration?

THE MAKING OF LAW

When we look to the legislative process, to the process of how law actually is made, we find not one but several sources. As the historical jurists insist, a good deal of law has developed in the customs of the people. What was once the expected or usual course of conduct became the necessary course. But the integration of custom is not the sole manner of lawmaking. While the Hobbesian sovereign is imaginary, there is in almost every society some remnant of the personal sovereign, a "leader" who is able by some means to impose his will upon others in the society. To this extent law reflects the will of a human person. However, in a modern democracy, the bulk of conscious lawmaking is accomplished by the citizenry in the sense that interested or moving individuals in the society persuade a large segment of the people or the political representatives of such people to promulgate a particular standard. And there is the lawmaking function of the judge who is called upon to decide a controversy for which there appears to be no controlling rule or standard extant. While the judge in this area has considerably less freedom of action than have other lawmakers, nevertheless he is performing a legislative function.

On what basis do these various lawmakers make law?

Often they claim, and sometimes even believe, that they are not making law at all but are discovering it. If the lawmaking process is truly an unconscious one, where is the new law "found"? Almost without exception, in some nonlegal standard of conduct which is believed to be right or at least generally accepted, or in some custom which has become sufficiently well established to be equated in the human mind with the "good" or the "right." In short, the source of law unconsciously made is preponderantly to be found in morality. And what about conscious lawmaking? While the moving individual in conscious legislation may be motivated by greed or other unworthy motive, on what basis is he able to procure the acquiescence of a sufficient number of persons to make the legislative process operative? Do we not find here that the appeal is preponderantly directed to persuade that the proposed law is required or permitted by some generally accepted concept of "right," or that the result of the law will be what is generally considered to be a public "good"? Even the personal sovereign, imposing law by will, is enjoined by Machiavelli to present his proposals on the basis of common morality, and such personal sovereigns do as directed. Both Hitler and the Soviet dictators have gone to great trouble to present their ideas as required by some idea of "right." In short, apart from the area where the rule is ethically or socially indifferent, as where an arbitrary choice must be made between two equally acceptable rules merely in the interest of order, the essential reference in the legislative process is to morality. The precept may or may not be "good" or "right," but those whose acts or acquiescence are essential to the making of the law believe that it is the one or the other. Human morality,

mistaken or imperfect though it may be, is thus a principal source of human law.

THE SANCTION

And what about the sanction, the thing that makes the law effective, that assures compliance? One thing that we can be sure of is that an efficiently operating modern legal system cannot long be maintained on the basis of nothing more than a threat of punishment. There will be in a society a relatively small number of essentially amoral individuals who must be controlled by a fear of punishment. A powerful sovereign can impose his will on a people for a short period of time. But an enduring legal order must be built upon general acceptance and upon a voluntary compliance. Even the despot must receive a voluntary support from those on whom he must rely to make his will effective over the wills of his subjects. No sovereign, however strong, can cow an entire people into long submission. As even Machiavelli pointed out, the sovereign must obtain a voluntary compliance from most of his subjects so that the force of his power may be directed against the recalcitrant minority. This in essence is what we mean when we talk of a modern democratic society as resting upon the consent of the governed; not that they consent in the sense of a Lockeian social compact, but they hold at all times the power to dispossess the tyrant by withdrawing this voluntary obedience.

On what basis do a people give this voluntary or willing conformity to law? As Pound has pointed out succinctly, men through the ages have sought to place an acceptable legal order upon some basis other than the will of an identifiable human being.[4] Thus the authority of law has been predicated upon God or the

gods, upon the wisdom of the ancient fathers of the people, upon the truth of some philosophical ideal, upon an ancient social compact freely entered into, upon the workings of some inexorable natural law of economics or politics. If the authority of the law is rested upon some individual person, he is invested with some super- or suprahuman authority, as in the theory of the divine right of kings. The study of this facet of history would indicate some sort of deep human yearning for a legal system based upon a notion of "right" or "good" or perhaps "necessary." Are we not suggesting again that the common acceptance of the legal system, upon which it ultimately must rest, is related directly to the conformity of the legal system to generally prevailing moralities?

ADMINISTRATION OF LAW

The process of judging or of administering law has several aspects of importance. First is the task of interpretation, of ascertaining the legislative "intent" in the particular case. The limitations of language are such that no form of words will be free of doubt under all circumstances. It is the task of the law administrator to resolve this doubt. How does he do it? Usually he says, and I think usually he means, that the doubt should be resolved in light of the purpose of the rule, or in light of what is usual or customary, or in light of what would be "just" under the circumstances. Since the purpose of the rule is usually stated at least in terms of "right" or "good," it would appear that the usual frame of reference in interpretation cases is morality. The reference may be imperfect. As Pound has pointed out, the legal philosophy of individual judges may be found to be inarticulate or even unconscious. As Frank

reiterates, the individual judge may take his own emotions and prejudices as morality.

And there is the task of application, the determination of facts and the selection of legal rules to apply to those facts. Austin assumed that this was an impersonal and automatic sort of thing. At the other extreme Frank suggests that it is all a sham and delusion, that the judge is deciding the case on nonlegal grounds and tailors his law, and perhaps even his findings of fact, to fit the conclusion already reached. While we cannot agree in full with Frank's thesis, we can agree that the process is far from automatic. Few fact findings are likely to be completely accurate.[5] The shortcomings of human observation, memory, and reason appear sufficient to guarantee this. Even the most honest and diligent judge is a human being of limited capability, who may tend to see in facts what he thinks he should see, and to find the rules of law which he thinks he should find. Even if we reject Frank's none too subtle suggestions of impropriety and corruption, we must admit that even the best disciplined judge is unable completely to put aside his own emotions, and experiences, and even prejudices, in handling the cases of others. But are not these disparaging references to these externals which intrude themselves upon the process of judging more often than not merely an unfavorable way of saying that the judge cannot help but inject into his judging his previously formed notions of what is "right" or "good" in the particular case? And so the morality of the judge appears as an inescapable part of the process. It is not suggested that everything extraneous which appears will be in the nature of morality, but it is stated that morality will be there, not necessarily a "right" morality, but morality none the less.

Since it is recognized that a certain amount of individualization of application is necessary to fit general rules to particular cases, almost all major legal propositions have a measure of discretion for the administrator. This discretion is immanent in such common words as "reasonable," "due," "fair," and the like. Here we are frank to free the judge to reach what he considers to be a just result in the case. That his reference in such a case will be principally to morality is obvious.

JUSTICE ACCORDING TO LAW

Underlying the entire legal institution is the proposition, usually stated and commonly believed, that the end of the entire process is "justice" according to law.[6] There is evidenced here a belief that there is such a thing as "justice," an external ethical or moral standard by which law and legal processes may be tested. The fact of this belief is not to be obscured by the quarrels as to the precise content of that justice.

Law Is People

If we are to summarize what has been said, it would seem proper to say that *law is people*. Law is made by people for the governance of people. People adjust their own lives to such law. Law is administered by people on the basis of facts as determined by people. A concept of law which would exclude these people is not law at all. These people are not automatons; they are free people. Lawmaking, law observance, law administration, all involve choices of conduct by people. These action-choosing people are less than perfect in their knowledge, in their capacity, and in their motivations. And so we are back where we started. On what basis do these human beings make the choices involved in the legal institution?

Every attempt so far to explain human motivation solely on a basis of individual advantage has failed. The Utilitarian's prime motivation of individual human happiness cannot explain all human choices, unless one gives individual happiness a meaning sufficiently broad to include the spiritual satisfaction which one gains by sacrificing one's own immediate happiness to demonstrate love of neighbor. The experience of all of us would indicate the futility of Marx's attempt to explain all human choices on some basis of economic determinism. Is it unreasonable to begin with the proposition that in guiding his own affairs the human individual will make at least some reference to moral standards? Is it unreasonable to assume that morality will be less evident in those choices which the individual makes in his participation in the legal order? History indicates that men in seeking a transcending basis for law are injecting a greater measure of morality into law than they put into their own nonlegal affairs. The common employment of such words as "justice" and "right" in treating of legal matters would indicate that people generally consider standards of morality particularly pertinent to the legal order.

Morality Is a Part of Law

If we take an empiric view of law—that is, if we look at law as it actually exists and functions as a human institution in a human society, disregarding theories as to its essence or as to what it could be or should be—we can conclude only that law is based upon human choices of conduct; and that those human choices are inextricably bound up with individual moralities. So far as law represents a community or concert of action or choice, it is bound up with com-

monly accepted or partially coinciding individual moralities. Until morality can be excluded from all areas of human choice, it cannot be excluded from those areas which touch the legal order. Realistically stated, all areas of the law are shaped in part by morality; morality is an inescapable part of its application and administration; conformity to morality helps assure the common acceptance essential to law's survival. The protection and furtherance of public morals are recognized as proper ends of the legal institution. In short, we come to the rather startling conclusion that morality is an effective and operating part of the legal institution. In our thinking about the legal order we must make room for what Roscoe Pound has so well named "the received ideals of the time and place."

The Task Ahead

This conclusion is not an occasion for self-congratulation or complacency. Rather it is a cause for concern. Remember that morality as we have defined it is essentially an individual human opinion or belief as to the "good" or the right." In the past peoples have accepted moral judgments which turned out to be of doubtful value. It is not impossible that some of those accepted today, and finding expression in the legal order, are of no higher quality. We can't very well sit by; we have a job of work to do.

In the first place, we must never lose sight of the philosophical task of seeking a measure or standard of "good" or "right" morals. Certainly we cannot hide behind the Austinian or Kelsenian thesis that such things are "improper" or "impure" and so of no concern to the legal scientist. I for one am unwilling to accept the somewhat naïvely Darwinian assumption that if

we will just leave these things alone the "good" standard ultimately will establish itself and prevail. It is encouraging that America is evidencing a greater interest in legal philosophy than it has for many years. The renewed study of classical Natural Law, as distinguished from its neo-Scholastic gloss, is a significant and encouraging part of this revived interest.

But the search for firm ethical bases is but a part of the task. Morality includes also relative ideas of social "good." If this standard is a part of our legal order, it merits study as careful as that devoted to the problem of ethics. What is "good" in a society? About the only thing we can be sure of is that mankind to date has not achieved the perfect state. We must therefore look inward upon our own society, upon our own civilization. We must develop standards by which to determine those elements of our society which tend to the more nearly perfect civilization, and must adjust our legal order to assure the security and progress of those elements. We must seek means to identify those elements of our society which do not work to the advancement of an ideal civilization, and must remove those things from the protection of our legal order. We must do hard and straight thinking about the function of human society and of the state, and what constitutes civilization. That these institutions are questioned by competing institutions of doubtful ethical validity is but an added reason for such activity. Fortunately Pound has provided a workable approach to this problem of relative social morality through his Theory of Social Interests and his neo-Hegelian civilization concept.[7] Pound's inability to divorce these things completely from absolutist ethical standards, despite his valiant efforts to do so, would indicate that the ultimate

solution to problems of social morality will turn upon the solution to the first problem of ethical "right."

But we can't stop with research for proper value bases. We have a job of education. For some years now American lawyers and judges have emulated Austin in declaring their freedom from legal philosophy. Philosophy was something for foreigners and professors and preachers. Lawyers and judges were concerned with the greater and more important practical affairs of life. This statement was more false than true. It was false in that these lawyers and judges did have a philosophy. The difficulty was that the philosophy wasn't a very good one. It was not very good because it was acquired by accretion and not by a process of reason; it was not very good because it had to make itself felt unconsciously rather than on the basis of intelligent examination. To the extent that the denial of philosophy was true it marked the abdication by the lawyer of his traditional place of leadership in public affairs, and a good deal of that leadership has slipped from his hands and into the hands of others. To the extent that the statement was true it marked the surrender of the right to claim membership in a learned profession.

We must therefore be evangels to many long on the Bench or at the Bar, urging them to seek and to recapture the means of perceiving greater right and justice in law, and through it a greater civilization to a weary people.

But we must above all hold ourselves dedicated to this task, prepared to discover right and justice and truth where we can, and to follow them where they lead. If today we take even one step in that path, we have triumphed.

1. Amos, Science of Law 48 (1874).

2. A convenient point of departure in Kelsenism is his General Theory of Law and State (Wedberg trans. 1946).
3. A good deal of the current vogue of this argument is due to Jerome Frank, Law and the Modern Mind (1930).
4. Pound, Introduction to the Philosophy of Law, Chapter 2 (1922).
5. This thesis is well developed in Frank, Courts on Trial (1949).
6. See, for an extended discussion, Pound, Justice According to Law, 13 Columbia L. Rev. 696, 14 *id.* 1, 103 (1913-14).
7. Pound, A Survey of Social Interests, 57 Harvard L. Rev. 1 (1943); Pound, Social Control Through Law (1942).

CHRISTIAN MORALITY AND THE CRIMINAL LAW

Wilber G. Katz

I

THE PAPERS at this morning's session explored in general terms the relation between religion and morality, and the relation between morality and law. My task is to illustrate some of these relations in a particular legal field, the field of the criminal law. This could be done, of course, in a number of ways since the Christian tradition with respect to law is rich and varied. To make my task manageable I must choose among the branches of this tradition. And since at previous conferences you have dealt more explicitly with Thomist legal philosophy, I shall consider the somewhat different tradition of classical Protestantism as to the function of law. This tradition will be compared with familiar secular theories as to the purposes of the criminal law and will be considered in the light of modern psychological analysis of criminality and of the social demand for punishment.

The Lutheran Formula of Concord includes this summary of the purposes of the law:

> It is established that the Law of God was given to men for three causes: first that a certain external discipline might be preserved, and wild and intractable men might be restrained, as it were, by certain barriers; secondly, that by the Law men might be brought to an acknowledgment of their sins; thirdly, that regenerate men, to all of whom, nevertheless, much of the flesh still cleaves, for that reason may have some certain rule after which they may and ought to shape their life.[1]

This threefold analysis of the purposes of law is not specifically Lutheran; similar statements appear in Calvin's *Institutes* and in the writings of other reformers.

As one begins to reflect on such statements, one is struck with the contrast between this analysis and the common man's moralistic view of the basis of legal responsibility. According to the common view, responsibility is a matter of moral blameworthiness, and moral blameworthiness inheres in free choice of evil. Belief in free will underlies both the common understanding of moral responsibility and the traditional view of legal responsibility. As Blackstone[2] put it, the only thing that renders human action culpable is "the concurrence of the will, when it has its choice either to do or to avoid" the act in question. Recently the United States Supreme Court referred to "belief in freedom of the human will and a consequent ability and duty . . . to choose between good and evil," saying that this belief is a "universal and persistent feature of mature systems of law."[3] With this view of human freedom, the common man believes that punishment of some sort is justified by the wrong itself, entirely apart from the results which its imposition may accomplish.

In the Formula of Concord, however, there is no

suggestion that the purpose of law is to punish free choice of evil. And when Calvin presents the same analysis of the purposes of the law, there is of course no assumption of free will. From the viewpoint of classical Protestantism, the purpose of law is not retribution for its own sake. The law is forward-looking. It is part of God's strategy in dealing with sin. It is "Christ's strange work," the necessary prelude to His proper work in the redemption of man.

II

The first of the three uses of the law is often referred to as "political," since here the law achieves its purpose through the organized force of the state. Men are deterred from breaking the law through fear of its penalties. The reformers were clear that the law's threat of force is necessary for the avoidance of social chaos. In Calvin's colorful language, God provides for the public tranquillity through the "constrained and extorted righteousness" of those "induced not by voluntary submission . . . but . . . only by the violence of fear."[4] Nor is the reference here to a small minority of criminals and potential criminals. The threats of the law are needed to deter all who are as yet unregenerate. And the Formula of Concord goes even farther. Even the regenerate need the law. In them the process of regeneration has only begun; they still need "not only the admonitions and threatening of the law" but also its "punishments and blows."

This insight as to the average man's need for the threat of punishment is confirmed by modern psychology. Dr. Gregory Zilboorg has said that the commandments " 'Thou shalt not kill' [and] 'Thou shalt not covet thy neighbor's wife' are not . . . prohibitions

against the deeds of some few . . . evil men. These are commandments issued for the guidance of the average man with average propensities."[5]

Dynamic psychologists tell us that the average man, through the experience of punishment in infancy, has learned to repress a part of his basic drives and to find socially acceptable outlets for the remainder. The result is an equilibrium, "a sort of contract," as Dr. Franz Alexander puts it, "between the powers which restrict our instinctual expression and the instinctual demands of the individual."[6] But the equilibrium is precarious, and Dr. Alexander insists that it is only with respect to a few crimes—cannibalism, incest, and the killing of parents—that the average citizen can do without external threats to back up his internalized controls. With respect to all other impulses, the aggressiveness of the ordinary citizen is held in check only with the help of the social threat of punishment. In this situation, the appearance of crime disturbs the inner equilibrium of law-abiding citizens and activates their repressed impulses. The result is a state of anxiety which requires for its relief the dramatization of the adage that crime does not pay.

This psychological analysis shows why the deterrent force of the law is needed and how it operates. It suggests also the psychological basis of the idea that retribution is just. As Dr. Alexander explains, the sense of justice springs from this inner bargain which was reluctantly reached when external controls were internalized in early childhood. Subjectively, an individual's sense of justice is his feeling that he may fairly be asked to maintain his renunciation only if like sacrifices are forced upon others also. The law's penalties are believed to be just, and this characteristic reinforces their deterrent effect.

The psychoanalyst explains further why the demand that crime be punished is often made with intense hostility toward the criminal. The average citizen is unable consciously to face his kinship with the criminal and therefore rejects him, emphatically and self-righteously denying any similarity. Thus, according to Dr. William A. White:

> The criminal . . . becomes a handy scapegoat upon which . . . [the ordinary citizen] can transfer his feelings of his own sinfulness and thus by punishing the criminal he deludes himself into a feeling of righteous indignation, thus bolstering up his own self-respect and serving to restrain himself from like indulgences. . . . The legal punishment of the criminal . . . is . . . a dramatic tragic action by which society pushes off its criminal impulses upon a substitute.[7]

As we have seen, the Judeo-Christian view of the nature of fallen man includes a similarly radical conviction as to man's need for the restraining force of the law. In the language of Charles Williams, "The chief use of punishment in the State is to frighten the majority of citizens from behaving as they wish to behave and as a minority do behave."[8] Under this view of the law, criminals are *used* by society to keep others in line. Modern social and legal positivists make no bones about this. Thus Mr. Justice Holmes wrote to Professor Laski:

> If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.[9]

This quotation may strike the reader with something of a shock. And it may seem more shocking that the-

ologians in the classic Protestant tradition are just as unapologetic about treating criminals as instruments for social purposes. Thus the Rev. Sidney Smith wrote in the last century: "When a man has been proved to have committed a crime, it is expedient that society should make use of that man for the diminution of crime; he belongs to them for that purpose."[10]

Moralists have often attacked this view as to the purpose of punishment. Kant insisted that it is utterly immoral for society to treat a man as a means to be used for its purposes. The only morally defensible basis of punishment, according to Kant, is that of retribution for acts freely chosen. On this point the Judeo-Christian tradition, with its "realistic" insights as to human nature paralleling those of dynamic psychology, is closer to modern positivism than to ethical idealism. Theologians in this tradition do not base criminal responsibility upon a relatively untrammeled freedom of choice. Their position is therefore not undermined by the findings of psychological and social science as to the great extent to which human conduct is determined.

Even modern idealists have conceded, of course, that the character of adults is largely fixed and that their freedom to act "out of character" is very limited. They have usually considered responsibility as resting on the fact that character is itself the product of acts freely chosen in the past. But the difficulty raised by dynamic psychology is that character tendencies become relatively fixed at an age so young as to make it inappropriate to speak of personal responsibility.

Here, then, is the troublesome fact about criminal responsibility. To the extent that criminal behavior is conditioned by early family influences and by later environment, to that extent the responsibility imposed upon the criminal is responsibility without fault—vica-

rious responsibility for the acts of those who determined his character and conduct. This is the fact which makes unacceptable the simple moralistic view of criminal responsibility.

But this fact that human freedom is very limited is no stumbling block for the Christian view of law which we have been considering. In this view, social peace requires that crime be punished, entirely apart from the extent of free will. The law is "Christ's strange work." Only if social disintegration is forcibly checked can individuals find the relative security necessary for moral and spiritual development. As Tillich puts it, "Love, in order to exercise its proper works, namely charity and forgiveness, must provide for a place on which this can be done, through its strange work of judging and punishing."[11]

In fact, in the Christian view, the largely vicarious character of criminal responsibility is not only no stumbling block; it is a clue to the deeper meaning of responsibility. But this meaning becomes apparent only as one considers the law also as a summons to repentance. And as we turn to this aspect of the law, we note that in the Formula of Concord the word "law" is used as including moral law as well as the law of the political state. Both are "God's law," ordained for the uses which we are considering.

III

From the Christian viewpoint, the second use of the law—as a summons to repentance—is the law's ultimate purpose. On this point modern secular thought agrees, though it uses terms like reformation or rehabilitation instead of repentance. But here we meet the essential tragedy of the law: the law is indispensable to the

process of reformation or repentance, but alone it is powerless to accomplish this end; and, what is worse, the law often impedes the process because of the nature of its penalties and the modes of its administration.

St. Paul emphasized repeatedly that the consciousness of sin comes only as the sinner is confronted with the law. "I should never have had sin brought home to me but for the law."[12] And repeatedly the reformers drive home the same point with varying metaphor. Thus Bullinger spoke of the law as the mirror which holds before man the image of his sinful nature. And with characteristic color Luther pictured the law as the "maul" with which God beats in pieces the beast of man's self-esteem.

But St. Paul and the reformers also made clear the impotence of the law. The law has no power to help men accept the truth of the image it holds before them. Or if it seems to succeed in this respect, it induces despair rather than repentance and reformation. Repentance requires not only the judgment of the law but the gracious mercy of forgiveness. Christ's proper work of redemptive love is necessary for the fulfilment of the law's purposes. Only as a sinner is conscious of God's loving acceptance can he come to a repentance which is beyond despair. In the words of Dr. Henry S. Nash, "It is through forgiveness that the law penetrates and dominates the inmost being of free men." "Forgiveness goes before punishment and so makes punishment effective." "The divine forgiveness reinstates the law within the will of the offender."[13]

Here again, secular thought furnishes a parallel analysis. The process of reformation is a process of moral development, of growth in responsibility. It can be observed in the development of children as well as in adult experience. In either case, the individual comes

up against "the law"; he experiences criticism which challenges him to self-criticism. But this experience is painful and growth in capacity for self-criticism can take place only in a favorable environment. The child acquires responsibility through the experience of punishment or correction. But to have this effect the correction must be accepted, and this means it must be experienced in a personal environment in which the child feels no rejection. Only with such support can self-criticism be learned without jeopardizing self-acceptance.

The process is similar when reformation takes place in adult life. Novelists like Dostoevski and Hugo have given us classic examples. They illustrate that forgiveness is necessary as well as judgment; that somewhere in his environment the offender must find acceptance and friendship. (This process of rehabilitation has also been compared to the process of psychotherapy. Dr. Alexander has said that the story of Jean Valjean is a precise analogue of the course of psychoanalysis.) In more recent literature, Faulkner's *Requiem for a Nun* and T. S. Eliot's play *The Family Reunion* dramatize this painful growth of responsibility.

In Eliot's play, when the curtain rises, the family is assembled awaiting the return of Harry, whose selfish and possessive wife has been lost overboard while the couple had been on a cruise some years before. Harry arrives, much distraught, and declares that he had pushed her over the rail. Most of the shocked family prefer to believe that this is a delusion. We learn that Harry is torn between a vague sense of defiling guilt, on the one hand, and, on the other, a feeling that the act was not really his own. In the audience we share this tension because we are never actually told what did happen. (One critic, like the insensitive family,

assumed that there actually had been no killing.) Figures of avenging furies, whom Harry has been trying to escape, appear in the window, and Harry, sensing that he is trapped, compulsively seeks to learn their meaning. He insists on finding the family skeletons and questions Agatha, a wise and sympathetic aunt. For her his questions tear open old scars of pain and guilt and force her to speak of her love for his father. Harry learns about his meager and loveless childhood, including his father's abortive plans to kill Harry's mother. He thus learns the way in which his character had been deformed and the extent to which his responsibility might be considered as limited. What Harry achieves, however, with the support of Agatha's affection, is acceptance of full responsibility. He learns that what the furies mean is the duty to accept responsibility without alibi, and he comes to see them not as furies but as bright angels to guide him in responsible life.

Here we see that in the process of repentance or reformation the law can operate only as a summons. The process requires personal relationships which hold out to the offender understanding forgiveness. But such a personal environment does not make reformation inevitable. There must be free and painful acceptance by the offender of the help extended to him; he must take upon himself full responsibility for his acts. He must forego any attempt to shift responsibility to others who have determined his conduct. He must be willing to accept freely and vicariously the responsibility for their acts which is inextricably intertwined with his own.

I have spoken of Eliot's play because it makes explicit this point that growth in moral responsibility means acceptance of vicarious responsibility. Harry overcomes

his morbid dissociation from his act only as he learns whose sins he is called upon to expiate and feels for his parents a measure of genuine sympathy.

This analysis, however, seems to put us on dangerous ground. The "normal" penitent certainly does not think of himself as shouldering vicarious responsibility. And if we found him talking in these terms we might well suspect that his "penitence" is badly tinged with pride, or rather that instead of penitence he is manifesting a morbid messianic pretension. Should not repentance be rather the simple confession of sin in thankful acceptance of forgiveness?

But at the sophisticated middle of the twentieth century this humble attitude is just what is lacking. Modern man has eaten much fruit from the tree of psychological knowledge. In the recent past most of his secular prophets have preached a rigid determinism. While this dogma seems on the wane, modern man cannot forget that quantitatively his freedom seems very small. We have taught this doctrine so successfully that even our juvenile delinquents have learned to blame their parents and social conditions.

Eliot's Harry embodies this aspect of the predicament of modern man. Like Harry, modern man needs the dangerous insight that moral responsibility is largely vicarious. But it is none the less responsibility which he has to shoulder. Rather, to quote Bosanquet, it is responsibility which "in his nature and spirit he has shouldered *ab initio*."[14]

This account of the process of moral rehabilitation makes apparent the difficulty in molding legal institutions so as to promote this end. The law can declare men's responsibility and summon men to accept it. But legal institutions can promote the acceptance only to the extent that they embody the principle of forgive-

ness. How is it possible at the same time to pronounce judgment and to extend forgiveness? Even in family relations, the difficulty is enormous—as any conscientious parent can testify. To what extent can the state organize both the administration of justice and the ministry of mercy? Can the law hope even to avoid impeding the process of rehabilitation?

One thing is clear. Legal institutions, however enlightened, must be supplemented by voluntary efforts of individuals and private organizations like the John Howard Association. The general community attitude toward criminals (particularly toward ex-convicts) may be crucial for the process of rehabilitation. Christians have traditionally been enjoined to perform "works of mercy" toward offenders, not only spiritual works of forgiveness but "corporal" works of visitation and help. To accomplish its purpose of rehabilitation, the law needs institutions like St. Leonard's House, the new hostel in Chicago; it needs men like Charles A. Ward, whose company has hired more than three hundred ex-convicts.

The reason for the law's impotence is twofold. There is not only the inherent difficulty in establishing through law the conditions favorable to reformation. There is the added difficulty that the law must also fulfil is first use; apart from reformation the law must use its force to reduce crime. Conflicts between the two purposes of the law are inevitable, since the means to achieve them are not fully compatible. Promotion of reformation may require foregoing the most economical and effective devices to prevent crime.

In its effort to prevent crime the law uses not only deterrence but also incapacitation of those whose actual crimes have shown their dangerous propensities. If crime prevention were the only objective, long and

rigid prison sentences would be defensible as the usual penalty, subject only to considerations of social cost. But a society which regards its own protection as the sole criterion would be repudiating the second use of the law. Not even in the strictest systems has there been an effort permanently to incapacitate all criminals, for there has always been some effort to "make the punishment fit the crime." The *lex talionis* may have its roots in primitive vengeance, but it points also to the limits of appropriate penalties.

From the viewpoint of reformation, the trouble with nonparolable life sentences is that they seem to negate forgiveness and thus impede the acceptance of responsibility. Except perhaps in cases of clearest danger to society, the penalties should leave open the possibility of return to the community.

This comment, of course, applies also to capital punishment. In Christian terms I am not sure that the case against the death penalty is stronger than that against life imprisonment. Indeed it is possible that there was once a Christian culture in which the heart of the man condemned might be reached by the judge's words ". . . and may God have mercy on your soul," together with the prayers of the wronged traditionally offered up at the side of the gallows. The case against capital punishment lies rather in the demonstrated danger of mistakes in identification and in the absence of evidence as to the deterrent effect of the death penalty.

Let us sketch in outline some features of a penal system which would attempt to take seriously the purpose of rehabilitation. Its rituals would express formal disapproval of the offense; they would proclaim the breach which the offender has made in his relation to society; but they would avoid the rhetoric and symbols of personal rejection. Such a penal system would in-

corporate a principle of individualization. There would be careful examination and classification of offenders and selective use of probation and suspended sentence. At least in the case of longer sentences, there would be an element of indeterminacy, with possibility of discharge or parole. This opens up, of course, difficult questions as to criteria for grant of parole and dangers of defeating the purposes of the system by arbitrariness in administration. A rehabilitative penal system requires also a variety of types of custodial institutions, varying in the extent of security provisions and in the opportunities for work, training, and therapy. It would facilitate visits by relatives and friends and afford opportunities for religious worship and teaching. And all of these features imply adequately paid, well-trained, and carefully selected personnel.

These features of enlightened criminal administration would require the community to shoulder an increased tax burden. They would involve also the voluntary acceptance of a degree of risk. They are features which would manifest the spirit of forgiveness. Effective forgiveness necessarily requires a willingness to become involved and to accept a share in the pain caused by the offender and in the cost of his restoration. Adequate support for such a program has never been available. The average man is apparently unwilling to accept either the cost or the risk involved, and it is his own need for the law which may explain why this is so. A genuinely reintegrative program requires an attitude of sympathy which is found only in those who have relatively little need for repression of aggressive impulses. To the extent that the average man keeps himself in check only by repression backed by social coercion, to that extent we must expect the average

man to demand harshness toward criminals and to refuse to bear the costs and risks of rehabilitation.

One may cite as an example the report of an abortive experiment in rehabilitation of sex offenders in a western state. A program of group and individual therapy was being offered to approximately forty inmates. The report states:

> After almost a year of work, . . . improvement was obvious in the inmates' freedom from feelings of isolation, inferiority and self-degradation. The patients exchanged their institutional garb for informal clothing, engaged in social activity within the institution and responded in their manner to the implied hope of mental health. . . .
>
> The reaction on the part of the surrounding community and the community within the state hospital was instantaneous. Parent-teacher organizations rose up in wrath, hospital workers were contemptuous and belittling, individual parents of children living outside the hospital . . . became enraged and frightened, newspapers ran stories depicting the horror of helping sexual offenders and the state government heads were petitioned for immediate action. Particularly irritating to the local public (medical and lay) was the observable reduction in feelings of degradation by the sexual patients. The sudden demand for restriction of the sex patients under treatment became overwhelming. The therapeutic program was summarily restricted, then abruptly halted.[15]

It is conceivable, of course, that those in charge of this program had shown themselves irresponsible in dealing with the risks of escape or premature discharge. But the reaction probably indicates rather that the equilibrium of the law-abiding citizens with respect to sexual behavior was not sufficiently stable for them to contemplate forgiveness for such offenses. And forgiveness always involves some shouldering of anxiety and risk.

IV

We turn, finally, to the third of the Christian uses of the law. In the Formula of Concord, you will recall, it was declared that God gave the law not only to preserve society from the violence of the unregenerate and to summon them to repentance, but also "that regenerate men, to all of whom, nevertheless, much of the flesh still cleaves, . . . may have some certain rule after which they may . . . shape their life."

It was about this third use of the law that controversy had particularly arisen. Some of the followers of Luther contended that the regenerate are freed from the law and no longer need its threats or its teachings. This position, however, was rejected. As we have already noted, it was declared that in the regenerate, regeneration and renewal are not complete but only begun. In the regenerate, "The Old Adam still inheres in the understanding, the will and all the powers of man and needs the threats and punishments of the law." One cannot speak simply of the regenerate and the unregenerate. One can only speak of men insofar as they are regenerate and insofar as they are unregenerate.

What is the function of the law for men insofar as they are regenerate? They view the law not as a hostile force to be obeyed out of fear. The regenerate man welcomes the guidance of the law and performs its works in gratitude as the first fruits of the spirit. He is concerned that the law should further the process of reformation and is willing to accept the burden of taxation which this involves. Nor will he join the clamor for greater severity with every report of parole violation.

But to the extent that men are not regenerate, they still need "not only the admonitions . . . of the law" but

also its "punishments and blows." To the extent that their need for the law is greater than they think, to that extent they will demand that rehabilitation of criminals be strictly subordinated to crime prevention. This was the difficulty with the community attitude toward the program for the rehabilitation of sex offenders already referred to. And one who understands the Christian doctrine concerning human nature will not be surprised that such reactions are widespread. The criminal law is for men as they are, though it looks also to the men they might become. In performing its third use, the law must continue to perform its first and second.

V

We have seen that the law can achieve its purposes only as two things happen—neither of which the law can itself accomplish. The law fully succeeds only as offenders shoulder responsibility for their acts—responsibility which unavoidably includes vicarious responsibility for antecedent acts of others. And this can come about only as others provide an environment of forgiveness, accepting vicariously the cost and risk which such an environment entails.

Our consideration of these points is best summed up by noting their relation to the doctrine of atonement, the Christian understanding of God's redemptive strategy. In this connection, Dr. Henry S. Nash's book, *The Atoning Life,* is profoundly helpful. The conquest of evil required first God's own sacrifice, His revelation that assumption of vicarious responsibility is the mode of atoning action. In one sense, the atonement thus made was made once and for all. But since man is left free, atonement must be a continuing process in which men can have a part. God calls men to walk in

the way of the cross—to live, in His power, the atoning life. The offender who accepts full responsibility for his act is accepting participation in the atoning life. So are his fellow-citizens who extend to him a costly forgiveness. As Dr. Nash puts it, the final problem of life is the fulfilment of Law, fulfilment which can come only as God lives His atoning life in the wills of sinful men.

1. Translation from Vidler, Christ's Strange Work 21-22 (1944).
2. Bl. Comm. Book IV, Chapter 2.
3. Morissette v. United States, 342 U. S. 246, 250 (1952).
4. Calvin, Institutes Book II, Chapter VII.
5. Zilboorg, The Psychology of the Criminal Act and Punishment 79 (1954).
6. Alexander and Staub, The Criminal, the Judge, and the Public 9-10, 47 (1931).
7. White, Insanity and the Criminal Law 13-14 (1923).
8. Williams, He Came Down from Heaven 174 (1950).
9. Howe, Holmes-Laski Letters 806 (1953).
10. Quoted in Davies *et al.*, The Modern Approach to Criminal Law 40 (1945).
11. Tillich, Love, Power, and Justice 49 (1954).
12. Romans 7:7, translation of Phillips, Letters to Young Churches (1947).
13. Nash, The Atoning Life 116, 120 (1908).
14. Bosanquet, The Value and Destiny of the Individual 149 (1913).
15. Bromberg, Roots of Crime: A Sociopsychological Analysis, 3 J. Pub. L. 436, 447 (1954).

A THEOLOGICAL ANALYSIS OF NATURAL LAW

Joseph D. Quillian, Jr.

THE DOCTRINE of Natural Law has played a sizable role in the history of Christian life and thought.[1] However, Protestantism has never formulated a consistent doctrine of Natural Law. The versions of Natural Law that have been proposed within Protestantism have seemed fragmentary at best and contrived at worst. An integral relationship between the doctrine of Natural Law and doctrines such as those of Grace and Love has not been effected. The purpose of this paper is to examine the problem of a Christian doctrine of Natural Law, with the hope that some possibilities toward an integrated Protestant doctrine of Natural Law may be suggested.

Our basic presupposition is the conversionistic point of view, which carries the conviction that truth or reality is one, and that all aspects of truth or reality may be interpreted most meaningfully in terms of what one takes to be the determining heart of reality. As William Temple puts it:

The world is what God sees it to be. So far as our vision of it is different from His, it is a false vision, blurred and distorted by the impurities in our organs of spiritual perception. The truth of things is what they are in the mind of God, and it is only when we act according to the mind of God that we are acting in accordance with reality. Everything else is making a mistake.[2]

That we do not and never will know perfectly and completely the mind of God, we must always humbly confess. And because we cannot perfectly know the mind of God, we are always "making mistakes." Our knowledge of reality, of society, and of ourselves is fragmentary and distorted. However, the unconquerable limitation and relativity of our own knowledge neither takes from us the vital conviction that God is, and that He is the Source of all meaning, nor does the relativity of human knowledge relieve us of the living necessity of trying to understand reality, and of committing ourselves in belief and action according to our best understanding.

If the mind of God defines reality, and if all things have meaning in relationship to the mind of God, then it is to our understanding of Him that we must look for the "principle of conversion" by which our ethics are profoundly and integrally related to our theology. In the way that we understand the mind of God, so we will understand the nature of Natural Law, Grace, and Love, and their interrelationships.

This means that we begin with the idea that Natural Law must be profoundly and integrally related to the source of Grace and Love if it is really to be "Christian Natural Law." It must be "converted."

The Problem of a Christian Doctrine of Natural Law

One of the problems which we encounter in trying

to arrive at a Christian doctrine of Natural Law is that of the kinship between the philosophical tradition of Natural Law and Christian theology. Both have their bases in being. Both are universally inclusive. Both believe in the moral governance of the universe. Both contain principles for private and public morality. Both see the foundation of morality in reality rather than purely in the customs of men. Both use a terminology including "justice," "freedom," "responsibility," "universality," and "order." It would appear that philosophical Natural Law and Christian theology are closely akin. However, if such a close kinship is simply tacitly assumed and acted upon, but proves not to be real, the clashes and divergences are likely to be more intense, subtle, and complicated between the supposedly "close kin" than they would be between theories of obvious distant kinship. Christian theology has shown its awareness of this peculiarly different relationship to Natural Law in the very vehemence of attack upon Natural Law by some Protestant theologians. Karl Barth, in a letter to English Christians in 1941, said:

> But what really matters is . . . the question: Jesus Christ or Natural Law? Is it still too soon to urge on you more earnestly today than ever before that Christian decisions as weighty and firm and lasting as they must be in this present crisis can be made only in the name of Jesus Christ, and not in the name of any human ideal? . . . I wonder whether every argument for our political obligations, which is based on Natural Law, does not inevitably lead to a division between the political and Christian spheres. . . . If men either openly or secretly consider Natural Law to be the revelation which governs their attitude, then they cannot help escaping from the present and taking refuge in some self-made shape of things to come.[3]

Without a Barthian-like opposition to Natural Law,

one is aware of contrast as well as similarity between philosophical Natural Law and Christian theology. The Ultimate Being of philosophical Natural Law tends to be pantheistic, while the Ultimate Being of Christian theology is personal. The essential characteristics of the Ultimate Being of philosophical Natural Law are order and justice, while the essential characteristics of the Ultimate Being of Christian theology are righteousness and love. Sin and evil are accounted for in philosophical Natural Law by man's freedom in the face of his own "true nature," and by the inevitable side-products of a universe which is "orderly on the whole." Sin and evil can be coped with only by man's moral endeavor and self-resignation. Sin and evil are accounted for in the Christian theology to which we hold by man's freedom in the face of a righteous and loving God who has given to him the true nature to be righteous and loving, and by the side-products of a universe which aims at redemption as well as order. And sin and evil can be coped with by God's grace and man's response. Philosophical Natural Law tends to present life as "still"—that is, philosophical Natural Law has an affinity for the Greek cyclical view of history. Christian theology sees life as intensely real and meaningful—that is, Christian theology has spawned the view of history which is both tragically and gloriously "non-repeating," but which "finds itself" at every moment by reference to the relative correspondence to God's will.

It is, then, apparent enough that a Christian doctrine of Natural Law cannot come about by an easy alliance of Christian theology and philosophical Natural Law. A Christian doctrine of Natural Law must be profoundly converted Natural Law, and not one which is superficially adapted. Both love and grace must permeate Natural Law, and must not stand simply as

principles of a higher realm that is superadded to the "natural" life.

Each of these doctrines, of Natural Law, Grace, and Love, is meaningful only in the relationship of God and man. And no one of these doctrines can be fully set forth without involving the other two in a profound and intricate interrelationship.

While certain essential elements appear in each of the three doctrines, these elements vary in the prominence or precedence in which they appear. For instance, the doctrine of Grace emphasizes the sovereignty of God and the dependence of man; that of Love emphasizes the redeeming love of God and man's response in trust and love to God and in love to fellow man; and Natural Law emphasizes the dependability of God shown forth in the order and intelligibility of the universe and the meaningfulness of man's life in moral responsibility. It appears that an interrelated presentation of the doctrines of Natural Law, Grace, and Love should allow the prominent emphases of each to be a correcting and an enriching influence on the other two.

We soon discover, however, that these three Christian doctrines are not on completely cordial speaking terms. And even when the "major forms" of these doctrines are brought to the point of being fairly on speaking terms, we find that their offspring still are strangers, or are overt or covert antagonists.

This situation of doctrinal disharmony is not always apparent. We speak easily and naturally of a "Christian world-view." We have at hand an applicable doctrine for every major area or focus on reality.[4] Seeing that these applicable doctrines are inferior to the Christian world-view, we accept the idea that the Christian world-view and its component doctrines form a syste-

matic and unified interpretative whole. What we do not so readily see is that, rather than forming together a vitally integrated "unifying frame," the component doctrines of the Christian world-view are more often "separately covering"—and the world-view itself is more generally inclusive. A further subtle complication comes from the fact that we often maintain the appearance of a harmonious doctrinal system by shifting meanings of particular doctrinal elements just enough, as we move from area to area of theological thought, to avoid obvious clashings. And sometimes these clash-avoiding shifts are effected only at the "general doctrine" level, and not at the points of derivative doctrines.

Consider "parent" doctrines such as those of Grace and Law. By varying doctrinal interpretations, (1) Law is an essential foil for Grace; or (2) Law is a pedagogue who, having delivered his pupils to Grace, is of no further use; or (3) Law is retained rather begrudgingly as necessary for practical action in the affairs of the world, though pretty thoroughly discredited as having any positive bearing on an understanding of the right relationship of God and man. Or again, (1) Law monopolizes the interpretative function, so that Grace, when regarded at all, is seen as an aid in attaining legalistically conceived ends; or, (2) Grace is relegated to that part of life which is labeled "best," but which is "superadded," and without which men can get along very nicely from day to day. By such semi-emasculating shifts in the meanings of Grace and Law, the two are contained within one doctrinal system without a serious and thoroughgoing thinking-through of the implications, both theoretic and practical, of such a method of relating these two vital doctrines. The superficial and tentative nature of the peace thus effected between

Grace and Law is seen in the fact that the offspring of the parent doctrines of Grace and Law—atonement and relative justice, for instance—seldom appear under the same doctrinal roof, and if they do the usual result is to have one of them assert the irrelevance to "real life" of the other.

Grace and Love, though more compatible than Grace and Law, have their differences, too. A "Grace theologian" will often detect a sentimentality and an optimism in a "Love theologian's" doctrine which do not do justice to God's sovereignty, and to man's dependence, sin, need, and temporal imperfectibility. On the other hand, "Love theologians" make man's moral responsibility meaningless, either by all but erasing moral freedom, or by presenting moral freedom in a too-willing employment of paradox that runs past genuine and legitimate insight and into theological double-talk. Among the three doctrines of Grace, Love, and Law, we see, then, evidences of breaches that all the devices of "paradox," "myth," "symbol," "mystery," or "principle" will not hide, much less heal. Though these devices are useful within measure, something more is needed.

If Christian doctrines lack a dynamic interrelationship at every level of their structure, they contribute to the conception that life is static and compartmental in structure. If Christian doctrines lack a vital unity among themselves, they cannot serve their rightful function toward unifying the lives of men in God-centered perspective and action.

Systematic unity and interrelated harmony are of direct concern in regard to both the interpretative world-view and the "inclusive dynamic or loyalty." In each regard every Christian doctrine should be clearly and convincingly referable to God. To be sure,

the doctrine of vocation allows that a Christian may do his daily work without being consciously aware of how he, at a given moment, is related to God in his work. And so it should be. But once he looks toward the interpretation of his work, he as a Christian enters into Christian doctrines in a most practical sense. And whatever doctrine is most immediately involved should refer him to God in that unambiguous fashion that conceptually opens the way for an impelling existential orientation of the creature to his God in his God-created environment.

If, for instance, the doctrine pertinent to a phase of life in question is an "outlying" one—one of the lesser offspring of a "parent" doctrine—that doctrine should be able to take a doctrinally informed man by the intellectual and spiritual hand and lead him on an orientation tour among the essentially related doctrines, and on to the presence of God, so that a man arrives there with a sense of the harmonious enrichment of the total truth at each point at which he touched another doctrine.

Surely an offspring or derivative of the doctrine of Grace, and an offspring or derivative of the doctrine of Law, each being true, must bring us at last to no other point than to the One True God, whose one will is the source of both Grace and Law. If the two doctrines seem to take us to two different worlds, we (1) must abandon as erroneous our conception of the unity of God, or at least must give up the hope of man's having any really meaningful apprehension of and relationship to the real world, the objective realm, to God himself; or (2) must find a forced harmony of the doctrines in question by accepting ready use of paradox, which declares the equal truth of two apparently diverse elements;[5] or (3) must hold that one or the

other of the two doctrines is at error in form, in content, or in orientation; and we must then think through the whole matter on a broad front and in all possible depth, to the end of reaching a more basic perspective that will allow the whole family of doctrines to be vitally unified within, and thus to be realistic and meaningful in the interpretation of man's relationship to God and to the world.

The third possibility obviously is the one that we support. Many of the deepest insights of Christian theology come by seeking and assuming a perspective deeper in locus and broader in potential range from which doctrinal elements may be related in ways that are not familiar, standard, and traditional.[6] We need a perspective that will permit doctrinal offspring from both side of the tracks and from the open country as well to associate freely, and thus to forget cultivated prejudices and to find a consequent mutual enlightenment and enrichment.

The Perspective of Christian Natural Law[7]

It is not within the scope of this paper to trace in detailed fashion the development and divergent elaborations of Natural Law theory through Heraclitus, the Sophists, Socrates, Plato, and Aristotle; Zeno, Cleanthes, Aristippus; Cicero, Seneca, Epictetus, Marcus Aurelius; the Church Fathers; Thomas Aquinas; the Scotist and Reform undercutting of Thomism; the now-explicit, now-compromised Natural Law conceptions of Luther and Calvin; the clear and attractive Natural Law theory of Richard Hooker; the revival of Natural Law in terms of international law by Hugo Grotius; the Natural Law variances of Hobbes, Locke, and Rousseau; the positivistic adulterations in modern jurisprudence; and the

tentative modern revival of Natural Law theory in jurisprudence and international relations. To be sure, some of the fundamental interests, emphases, and insights of the great Graeco-Roman exponents of Natural Law will appear in our defining of the Natural Law perspective. But it will also appear that there are some important differences between "Christian Natural Law" and "Philosophical Natural Law."

We mean by "the perspective of Christian Natural Law" the essential temper and committed point of view of "converted" Natural Law. It is actually a perspective within a perspective, because it is the conscious and deliberate "value-focus" of Natural Law within the general Christian perspective. We might find an analogy. In the broadest perspective, we know that the starry sky is one and the same whether viewed from the position of Earth, Moon, or Mars, but still each particular view affords a unique slant within the general perspective. And if we had to live lives of celestial commutation, we would not be properly oriented for living until we were at home in our broad environs from each particular perspective. As our actual lives *are* lived in constant reference to the doctrines of Law, Grace, and Love, we need to be at home with the views of and insights into life of each. And perhaps we shall find in interrelations a common "essential significance"[8] that will permit us to see Natural Law, Grace, and Love as distinguishable foci which yet are integrated in a "unifying frame."

The perspective of Christian Natural Law does not mean, then, simply "seeing things from the point of view of Natural Law," as if to imply that there is a distinguishable Natural Law philosophy which has an independent history from Heraclitus to the present day —a *philosophia perennis*[9] in relation to which alone one

may form his controlling point of view. In decided contrast to this, we are aware that our Natural Law perspective is profoundly informed by the revelation of God in Christ, by the history of Christian doctrine and deed, by Christendom and the Christian community of the present day, and by our own personal response to all of these.

Christian theologians do their work of setting forth systematic doctrines within the Christian community. They "grow up" as did Kant, surrounded by teachings that all but inhere in their thinking as theologians as well as "practicing Christians." Christians "grow up" with conceptions that man is a morally responsible creature, that God is the dependable Creator of a dependable universe, that the laws by which men ultimately must live are given by God, and that the essential revelation of God is in Jesus Christ. Only as Christians undertake to set forth in clear fashion the total fabric of their faith do they become aware of the life histories of the various parts—the distinguishable doctrines—of their faith. And even then the life histories of all the doctrines are not clear-cut. For instance, different principles that might be called Natural Law principles are simply elements that are common to all men, Christian as well as classical, who believe that there is a way of life that is not swallowed up in relativity, and who seek to speak systematically about that life and the universe in which it exists. It is, however, a vital question whether such elements should simply be called "common," and this aspect of the truth should be emphasized almost exclusively, or whether we must say that these "common" elements of Natural Law are so deeply informed by the metaphysics and the "life-relating" dynamic of various religions and philosophies that they (the "common" elements) actually are trans-

formed or are converted to a far greater degree than usually is recognized. That the latter is actually the case is indicated by the shifts in the meaning of "Nature" that we find from one philosophy to another, or from philosophy to theology. Christian theology certainly may say:

> Nature regarded through our history is indeed a symbol of what we mean, a pointer to God; but nature uninterpreted through our history and faith, or torn out of this context and placed in another does not indicate what we mean. It means various things according to the point of view from which it is regarded and the context in which it stands—utter indifference to man and all his works in the context of despair, a blessing upon brutality from the point of view of confidence in military might, and a dominant interest in mathematics in the context of faith in mathematical thought as the only road to truth.[10]

There is a serious danger that we will overlook the importance of perspective and context for Natural Law if we maintain that Christian theologians simply came upon a Graeco-Roman doctrine of Natural Law which they adapted to the Christian faith (as Troeltsch at times seems to do).

The very fact that the Apologists were the first to refer in volume to Stoic Natural Law should be a hint for us to examine critically the "adaptation theory" of Christian theology's acquisition of Natural Law. An Apologist of any day is aware of those elements in the faith of a possible convert with which he might make connection in presenting the Christian faith most meaningfully and convincingly. As William Temple says: "You can never persuade anybody of anything unless you first recognize the truth in the position which they hold and admit it, or, indeed, if possible, strongly assert it. That being done, the opponent, realizing that you

understand his case, may be ready also to listen to what more, also, you have to say."[11]

It is altogether likely that the early Christian Apologists held many conceptions quite compatible with Natural Law before or without being consciously aware of the Stoic doctrine of Natural Law. The fact of the easy passage of ideas around the Mediterranean world would lend support to this thesis. Also, the Old Testament references to "law written on the hearts" of men are not poles apart from Natural Law thinking. For instance, when a Stoic says, "Live in accordance with Nature that you may be serene and happy," a Hebrew says, "Thou shalt do that which is right and good in the sight of the Lord; that it may be well with thee."[12] When a Stoic says, "Nature has given us laws for our good," a Hebrew says, "The Lord commanded us to do all these statutes . . . for our good always."[13] We can see why the identification of the Ten Commandments as a recapitulation of Natural Law is no great leap for the early Church Fathers.[14]

It is entirely possible, however, that the Apologists, having become aware of Stoic Natural Law as a distinguishable system, did lead the way to what appeared to be the taking over and adapting of relative Natural Law as a social doctrine. Without acknowledging the full effect of the interpretative conceptions already held, the early theologians were able to use the doctrine of Natural Law to make the church's peace with the Constantinian world. This was easier to do when speaking in terms of principles—Natural Law and relative Natural Law—than it would have been had they been speaking in terms of God and of God's will. Adjusting to the actual situation by adapting Natural Law to fit them appeared to be justifiable good sense. It would have appeared to be a sinful presumption to "adapt"

God's will to the actual situation. The use of relative Natural Law conceptions concealed from the successors of the Apologists the basic insights into Natural Law which would have related Natural Law in an integral fashion to Christian theology. As a result, they held an almost artificially constructed form of Natural Law which could be held on the social-problem (actual situation) side of man away from the eyes of God. In terms of the Decalogue, this process amounted to the separating of the two tables of the Law.

If Natural Law had continued to serve for the later Fathers the function that it served for the Apologists, a much clearer gain in the use of Natural Law might have been scored. A great value of Natural Law is precisely that which the Apologists first perceived—an apologetic value. For them, Natural Law did not give the basic illumination of any truth, social, ethical, or otherwise. Rather, they were able to use Natural Law as a non-defensive, generally accepted body of insights into the moral life, and then to show Natural Law adherents how much more profound and unified these insights are when converted into the body of the Christian faith. The Fathers were not persuaded by Natural Law (though they might have been "bulwarked" in seeing evidences of God's grace even there), but they persuaded others by using Natural Law as an apologetic device. In turn, the "apologetic passion," which is none other than the intense desire to speak meaningfully of the relatedness of the Gospel to the whole of life, did have a salutary influence on all aspects of Christian doctrine. This apologetic passion maintained "sweep" to what otherwise could have become an increasingly refined and esoteric faith, meaningful only within the narrow circle of the initiates, having the effect of withdrawing them from "life in the world,"

and making the Christian faith irrelevant in the broad affairs of life.

The "General Conversion" of Natural Law

The conversion of Natural Law has been incomplete. As a result of this partial conversion some dangerous distortions in the nature and function of Natural Law have appeared. This is not to say that the partial or "general" conversion of Natural Law in Christian theology has not been important. For, as Troeltsch indicates, Christian Natural Law has played a key role in the shaping of a Christian social ethic. It is today the basis and body of the social ethic of the Roman Catholic church. However, the deep-set difficulties of Thomistic Natural Law as a sufficient basis for Christian ethics are exposed too clearly by Reformed and by contemporary Protestant thought for us to rest satisfied with this "generally converted" form of Natural Law.

The value or "good" of this partial or general conversion of Natural Law is something like that of the conversion of a headhunter who has been converted from headhunting by a Christian missionary. No one would deny that such a conversion is highly worthwhile. Nevertheless, this conversion may come about without the headhunter's ever entering that vital relationship with God that means genuine regeneration, or without the headhunter's having any sense of the Christian community, or of love for the man whose head he no longer permits himself to covet (or, if coveting, to acquire). In fact, if the very giving up of headhunting is made to be the essential symbol of conversion, the erstwhile headhunter may be frozen, morally and spiritually, in a conception of the Christian life that is limited, negative, legalistic, and a cornucopian source

of spiritual pride and self-righteousness. A partially converted Natural Law has great potentiality for producing just such results as these.

Now certainly a stunted and twisted form of Christian faith may be preferred in the actual situation to the way of life which has headhunting as its central characteristic. However, no devoted and capable missionary will stop in self-satisfaction with simply persuading a man not to hunt heads. He will press with all the consecrated imagination he has to put his bizarre friend in the way of a fuller and more positive revelation of "the Way, the Truth and the Life." And so a theologian who is attempting to convert Natural Law may see some actual value in the partial conversion of Natural Law, but he should not rest short of the complete conversion of his Graeco-Roman friend. Such a "resting short" appears to have happened, however, in Christian theology's dealing with Natural Law. This seems evident as we analyze the familiar account of how Natural Law became Christian.

The semi-pantheistic Logos-universe of Heraclitus, the objective and "knowable" world of Socrates, the real-ideal universe of Plato, the stratified "Nature" of Aristotle, and the ordering, harmonious Totality of Nature of the Stoics became, in Christian theology, the created world of God. In short, the "Nature" of Christian Natural Law is created, motivated, and sustained by the will of God. As Rommen says:

> For Augustine the substantial ideas, which Plato had conceived of as dwelling in a heavenly abode, became thoughts of God. The impersonal world reason of the Stoics became the personal, all-wise and all-powerful God. The purely deistic *Nous* of Aristotle became the Creator-God who transcends the world, but who continually sustains it through His omnipotence, directs it through His providence, and

governs it according to His eternal law. This eternal law was for Augustine identical with the supreme reason and eternal truth, with the reason of God Himself, according to whose laws the inner life and external activity of God proceed and are governed. God's reason is order, and His law rules this ontological order, the order of being, of essences and values.[15]

The Golden Age of the Stoics came to be the pre-Fall Age of Christanity. Origen speaks of "those who fell from that primeval unity and harmony in which they were at first created by God, and who, being driven from that state of goodness, and drawn in various directions by the harassing influence of different tendencies, the single and undivided goodness of their nature into minds of various sorts."[16] And the Senecan Golden Age, which was cast in terms of the future rather than the past, became the "Restoration" in Jesus Christ. Methodius says:

> "For the law of the Spirit of life in Christ Jesus hath made me free from the law of sin and death," so that "He that raiseth up Jesus from the dead shall also quicken your mortal bodies by His Spirit that dwelleth in you;" having "condemned sin" which is in the body to its destruction; "that the righteousness of the law" (Romans viii 2, 11, 3, 4) of nature which draws us to good, and is in accordance with the commandment, might be kindled and manifested. For the good which "the law" of nature "could not do, in that it was weak," being overcome by the lust which lies in the body, God gave us strength to accomplish, "sending His own Son in the likeness of sinful flesh," so that sin being condemned, to its destruction, so that it should never bear fruit in the flesh, the righteousness of the law of nature might be fulfilled, abounding in the obedience of those who walk not according to the lust of the flesh, but according to the lust and guidance of the Spirit.[17]

The Logos, which was both the essential nature of the

universe and the essential nature of man, and which constituted that very relatedness by which men could be enjoined to "live according to Nature," became included within the Christian conception of the Logos. Coming perhaps more from the Hebrew Wisdom background than from the Greek, this may be considered a transfiguration (in John Knox's sense)[18] of the two preceding conceptions through what is conceptually a new element—the pre-existent Christ. But the Christian conception of Logos does include all that the Greek Logos means, which is the point that we are making.

Christian theology from the beginning was at one with the Natural Law conception of the importance of the moral responsibility of man. But the emphasis within Christianity on sin and grace led to an apparent divergence concerning the nature of man. It was maintained by the church Fathers (though in varying degree) that sin had distorted man's reason to the point that man was incapable of complying with Natural Law in his own strength, and therefore needed the grace of God for the cleansing of his sins and the restoration of his nature to the point that he could obey Natural Law. (See Methodius above.) And precisely here we come upon the central difficulty. The grace of God was conceived with fatal narrowness, and man's essential nature in reference to Natural Law continued to be set too largely in terms of "reason." As a consequence, Christian theology became defensive concerning the "truth of grace" on which it rested and which it presumed to defend. Grace was identified with revelation, and nature with reason. This in turn was the basis for the distinction between the Lex Naturae and the Lex Christi. Troeltsch says: "The importance of the doctrine of the relation of Lex Naturae to the Lex Christi has always naturally been stressed as a fundamental dogma.

It is perfectly correlated to the general distinction between Reason and Revelation."[19] The "schematic infatuation" involved in these distinctions has persisted into our own times, and has prevented a profound and broad reinterpretation that would allow a meaningful and realistic unity among the doctrines of Natural Law, Grace, and Love. The "general conversion" of Natural Law has indeed had a momentous effect, negative as well as positive, on the history of Christian ethics and theology, and consequently on the history of Christian civilization. Those interior doctrinal difficulties which not only were allowed to remain, but actually were *fixed*, by the "general conversion" of Natural Law, in the whole pattern of approved Christian thought, have resulted in confusion and clashings among derivative doctrines of Natural Law and Grace, and also in an uncertain witness on the part of Christians in the affairs of men where Christian ethics should count for so much.

It is evident, however, that contemporary Protestant theology contains some promising possibilities for effecting a "vital conversion" of Natural Law. This conversion must be conscious and explicit. It is the *conscious* dependence on God and loyalty to him that place a man effectively among the "converted." Likewise, a Natural Law doctrine that is to serve the Christian faith in unambiguous fashion needs to be more than "generally converted." It must be consciously and clearly related to the heart of the Christian faith in a dynamic way, and not in a Thomistic architectonic or a neo-Lutheran compartmental way.

Protestant theologians have observed that the "definitive a priori elements" of Christian Natural Law are more of faith than of reason, and of faith that is inseparable from the revelation in Christ. This is and has been a clear opening to establish the position that,

while "reason" is incapable of apprehending even the essential nature of Natural Law, the apprehending-responding faculty (which is nothing other than the total person in relationship to the environment present) is precisely as capable of receiving and responding to Natural Law as it is of receiving and responding to any other specific expressions of the will of God. Both responses are dependent upon revelation and grace for interpretation and motivation. Working at odds with this view is that which insists upon seeing Natural Law as universal—as common to all men. This has amounted to a steadfast refusal genuinely to convert Natural Law. It has meant the persistence within Christian theology of the fiction of a "common reason" shared by all men by which men may know justice and may do it.[20] Strangely enough, the Christian defensiveness, which intensely desires to exclude anything with universalistic implications as an integral part of the Christian faith, and an inclusive tolerance, which intensely desires to preserve some basis for common ethical understanding and action among men of different faiths, have worked together against the "vital conversion" of Natural Law.

Another opening for the vital conversion of Natural Law has existed ever since Christians came to think of Natural Laws as "Laws of God." From Heraclitus on it is apparent that that which determines the nature of Natural Law is the nature of Nature. If that Nature is known only in terms of God, and if God is known by Christians in terms that are inseparable from the revelation in or through Jesus Christ, then Natural Law for Christians actually is already vitally converted. The failure to recognize this and to act upon the basis of it in setting forth systems of Christian doctrine might be laid to a peculiar sort of persistent confusion. The vital conversion of Natural Law when Natural Law is

seen in relationship to God seems to have been pretty clearly recognized. But when theologians have looked at man's relationship to Natural Law, and have got into that rhododendron-hell of the "reason-sin" problem, they have usually ended up by inflicting a semi-excommunication on Natural Law itself. This has resulted in the obscuring of the fact that the difficulty is not in Natural Law, but in the way that men conceive it; not in Natural Law, but in man's relationship to it. A clear understanding of the essential relationship of Natural Law to grace may well avoid this particular block to the formulating of a Protestant ethic integrally related to theology.

Yet another opening through which the vital conversion of Natural Law might have come about is in connection with the Logos. The Greek Logos is the essential nature of "Nature" and of man. The Christian Logos is the essential nature of the Creator and Sustainer of nature and of man. But the Christian Logos is far more than the Greek Logos. In man, the Greek Logos is what we would call the "rational moral faculty." In man, the Christian Logos is at heart the nature to respond to God in faith, love, and obedience. This distinction calls for the sort of profound rereading of the meaning of Nature and of man's relationship to it that is characteristic of Irenaeus. Instead, most Christian theologians have tried to relate "moral man" to a Christian Nature which is infinitely greater in height and depth[21] than Greek Nature, through a Logos that is more nearly Greek than Christian.

It should be no surprise that the crucial point for *Christian* theology and Christian ethics should come at this point of Christology. The one vital question to be asked of any theology or ethics in determining whether or not it is profoundly Christian is: "What is

your Christology?" Much of the so-called Christian ethics holds no explicit or integral Christology. That is, some form of Christology or other may be avowed, but it makes no essential difference to the ethics. Rather, the ethics is a matter of "following the teachings and example of Jesus," or of "abiding by the Golden Rule." Surely this is good as far as it goes. But the fundamental basis, the ultimate grounding, of a Christian ethics must be in the person and function of Christ, and not simply in the words and deeds of Jesus. Otherwise we find ourselves quite inescapably in a situation that may be called "comparative ethics," and we find that our "Christian ethical principles" were set forth prior to Jesus' birth, so that we have to appeal to His work as a co-ordinator and "coherer" of all these principles to establish His essential importance. But most serious of all, we are left with an ethics of "teachings and example," which, "when the day is done," is really pretty thin.

Any ethics worthy of the name must propose to relate men in their responsive thoughts and actions to reality. Plato knew this, and consequently is a better servant of Christian ethics than is the Christian ethicist who does not know it.[22] In short, Christian ethics is based upon the person and function of Christ, who reveals God to man and man to himself in such a way as to effect a reconciliation of man to God and of man to himself. In this reconciled relationship of man to Ultimate Reality—to God—man may know the Natural Laws as they really are—God's structural principles by which all Nature *is*. In personal terms, the Natural Laws are rightly apprehended by moral man as the gracious biddings of God, Sovereign-Father, who in purposeful love creates, redeems, and sustains. In Christ we know God without whom we can know nothing

truly of the nature which God has created or the laws pertaining to it.

The Temper of Natural Law: The Symphonic Sense

The "symphonic sense" is indigenous to the Natural Law point of view. It is an appreciative and approving awareness of the "overarching unity" and harmony of which Professor R. L. Calhoun is fond of speaking. The symphonic sense is close to a "committed apprehension" of Plato's justice, the differentiated harmony principle.[23]

Much light is thrown on the Natural Law focus by the symphonic analogy. The whole symphony (the harmonious ordering of life "according to nature") is the central concern. Each musician finds his deep fulfilment by playing his own part in harmony (in keeping with "real" nature) with the others, according to the score (plan of nature or reality) of the symphony. The musician's discord (sin) is the source of personal misery and of the distortion of the entire symphony (distortion of actuality, not reality). The musicians are under the director (the World Logos) to whom they are all intimately related. However, they are under the direction, not the domination, of the director, so that each musician's individuality (of being and function) and responsibility are clearly evident.

That the symphony as we actually know it is always stricken with innumerable discords is all too apparent. The symphonic analogy is not a picture of actual life. Furthermore, the view of sin purely as discord is unrealistic.[24] However, those glimpse-experiences of relation to and harmony with nature (reality) are "earnests" in the sense that "visions of God" or "crucial apprehensions of revelation" are "earnests." The experiences of both kinds are unattainable as a permanent state, but

they are insights into reality itself—insights which feed the souls of men and give meaning to life in a world in which sin is never absent and moral endavor is forever relative.

By symphonic sense, man recognizes his kinship with, not his lordship over, the natural world.

"Man may be more than a part of nature, but he is that. At every turn he is dependent on his natural environment, and if he is to prosper in the long run it must be as a partner with nature in the production and utilization of its resources, not as its lord exploiting nature for his own ends."[25]

"With such a view we should be able to go about the world letting every sight and sound speak to us concerning God. In some things we shall seem to find him immediately in all that is beautiful, in all that is noble. In other events we shall seek him not so much in the isolated fact as in the process of which it is one episode, trying to trace out there the purpose by which he guides the world and all our lives."[26]

A man, believing all things to be created by God according to the real nature that He chose to give them, finds, for instance, a meaning in what may not inappropriately be called "communion" with the mountains. This communion may be deeply salutary for man, the sinner. Here he is, one who is given a "real nature" by God, but who has it now only in the distortion of an "actual nature." He knows himself to be bound in the community of sin. But he comes to the mountain, majestic and noble in its complete harmony of the real and the actual. There is no "tension of being" in the mountain. It *is* its real nature in this world in which man never will be completely "real." There is a sacramental element in the ready yielding of the "real" mountains, trees, and streams to communion with

a man who knows that they, like him, came from the hand of God. To be sure, if the man did not know the loving creator through Jesus Christ, this mediation of reality and peace through mountains and their kindred of the natural world would not be what it is. But enjoying the revelation of the "Christian God" as one in Christian civilization to some degree inescapably does, the pure reality of physical nature in the mountains mediates a serenity and craggy strength on which man of himself cannot lay hold. This melodic kinship with the mountains attests to the sustaining Grace of God in which His so-called "lower creatures" minister to creature-man.

That the determining factor is the hand that we see behind physical nature is seen in the history of a massive mountain that sits just behind Massacre Bay on Attu Island in the Aleutians. The Aleuts gave to this fog-mantled inactive volcano the name of Mount Terrible. The invading United States Army made a slight shift and renamed it Mount Buckner, in honor of the doughty commander, General Simon Bolivar Buckner. The Navy men, who soon came to settle down at Massacre Bay for an extended stay, noted that near the top of the mountain there was a gigantic scoop-out which gave the impression of a mammoth chair. It was suggested, half wryly, that perhaps that was where God sat down while He was making the Aleutian Islands, and wondered whether to go ahead and finish them or not. The mountain came immediately to be generally known as God's Seat, and the great brooding mass thenceforth bespoke benevolence rather than threat.

The symphonic sense of Christian Natural Law means an awareness of the harmony of the "good" world created by God, whom we know through Jesus Christ. It is an earnest of a full apprehension of what

Calvin refers to as "the genuine order of Nature."[27] This order of Nature attests to God's glory

> . . . in characters so clear, unequivocal, and striking, that the most illiterate and stupid cannot exculpate themselves by the pleas of ignorance. The Psalmist therefore, with great propriety, exclaims, "He covereth himself with light as with a garment;" as if he had said, that his first appearance in visible apparel was at the creation of the world, when he displayed those glories which are still conspicuous on every side. In the same place, the Psalmist compared the expanded heavens to a royal pavilion;—he says that "he layeth the beams of his chambers in the waters; maketh the clouds his chariot; walketh upon the wings of the wind;" and maketh the winds and the lightnings his swift messengers. And because the glory of his power and wisdom is more refulgently diplayed above, heaven is generally called his palace. And, in the first place, whithersoever you turn your eyes, there is not an atom of the world in which you cannot behold some brilliant sparks at least of his glory. But you cannot at one view take a survey of this most ample and beautiful machine in all its vast extent, without being completely overwhelmed with its infinite splendour. Wherefore the author of the Epistle to the Hebrews elegantly represents the worlds of the manifestations of invisible things; for the exact symmetry of the universe is a mirror, in which we may contemplate the otherwise invisible God. For which reason the Psalmist attributes to the celestial bodies a language universally known; for they afford a testimony of the Deity too evident to escape the observation of the most ignorant people in the world.[28]

Man knows himself to be a part of this world in which God's hand is so satisfyingly evident. "It is not only of a human community that he is a member, but also of a society which includes the myriad tribes of nature, animate and inanimate, because through all there lives and moves that Mind, or Other akin to mind, with which in his Science and his Art man enters into fellowship."[29]

It is the symphonic sense that leads one to respond so wholeheartedly to the Master's notice of the birds of the air and the lilies of the field, and to understand why it was to a mountain that He went a long while before day to pray to His Father. To these things the man with symphonic sense will hold, and will insist that Pauline insights must find harmony with them, or else must give way.

It is no law which is a foil for the Gospel, or which stands in paradoxical relationship to grace, that Clement of Rome saw as the principle of harmony in the universe.

> Let us look steadfastly to the Father and Creator of the universe and cleave to his mighty and surpassingly great gifts and benefactions of peace. The heavens revolving under his government are subject to him in peace. Day and night run the course appointed by him, in no wise hindering each other. The sun and moon with the company of stars roll on in harmony according to his command within their prescribed limits and without any deviation. The fruitful earth, according to his will, brings forth fruit in abundance in the proper seasons for man and beast and all the living things upon it, never hesitating or changing any of the ordinances which he has fixed. The unsearchable places of the desert and the indescribable arrangements of the lower world are restrained by the same laws. The vast unmeasurable sea, gathered together by his working into various places, never passes beyond the bounds placed around it, but does as he has commanded. The ocean, impassable to man, and the worlds beyond it are regulated by the same enactments of the Lord. The seasons—spring, summer, autumn, and winter—peacefully give place to one another. The winds in their several quarters fulfill at the proper time their service without hindrance. The ever-flowing fountains, formed both for enjoyment and health, furnish without fail their breasts for the life of man. The very smallest of living beings meet together in peace and concord. All these the great Creator and Lord of all has appointed to exist in peace

and harmony, while he does good to all; but most abundantly to us who have fled for refuge to his compassion through Jesus Christ our Lord, to whom, glory and majesty forever and ever. Amen.[30]

Not in a passionate and defensive self-importance which claims lordship over the beasts nor in perverted anxiety which strains to know oneself to be "justified" before God does the symphonic sense find itself. Rather does it find itself in that unself-conscious humility which rejoices in being a part of so good a "real" world created by God who himself called it good.

We do not contend that the symphonic sense and that which it immediately implies can constitute the basis for an adequate theology. We do contend that a theology which does not include most profoundly the meaning of the symphonic sense has no impelling validity for one who has heard the symphony that Clement heard.

The Two Basic Principles of Christian Natural Law: The Benevolent Sovereignty of God and the Responsibility of Man

The essentiality of these two principles for Natural Law doctrine is indicated in "the scandal of Stoicism." Stoicism is notorious for its holding of a metaphysics which directly contradicts its central ethical principles. Stoic metaphysics amounts to a strange type of materialistic determinism, the all-determining Logos being conceived in "material" terms. If this metaphysics were carried to its logical conclusion and were related to the ethics as a metaphysics normally should be, any real moral responsibility of man would obviously be destroyed. But despite a glaring and, to some, a scandalous, inconsistency, Stoicism resolutely holds to both of these principles so essential to Natural Law doctrine.

Christian theologians should be charitable toward the Stoics for this inconsistency. For what it boils down to is that Stoicism, lacking a conception of a Sovereign God who, ruling all things, yet gives and permits to man a freedom which makes him responsible, had to resort to a metaphysics which contradicted its ethics at a serious point, in order to hold to the two basic principles—the controlling order of the universe and the moral responsibility of man.

Clement's "hymn"[31] is laced with the principle of controlling order. Or, in more strictly theological terms, the underlying theme is the benevolent and sovereign God who governs the physical universe by laws that effect an immense and intricate harmony. God, who is the One Source of all things that truly are, and who is the dependable ground of reality, acts in the "normal occurrences" of the orderly universe. Christian Natural Law does not assert, of course, that this form of activity is the only one by which God acts. "It is not that there is a fixed natural order laid down once for all by God, and since left alone, with which from time to time He interferes; it is that all the while He is acting, only all the while it is appropriate, on most occasions, to follow a regular course, as does the ordinary man of regular habit in the conduct of his daily life."[32] This "regular course of God's daily life" is an indication of the unity and dependability of God himself. Man's understanding of the nature of God, refracted through man's sin and God's responses to man's sin, often falls into grievous error at the point of the unity of God in being and purpose. "If God is rightly thought of as first and foremost righteous, however much that conception of righteousness is to be deepened into the Christian idea of love, then certainly it must be true that the event or fact which may call Him forth from routine activities,

so to speak, will be what is diametrically opposed to this which is His own Nature."[33] And this which calls God forth from "routine activities" is sin. But the crucial point is that God's "unusual activity" is also an expression of "His own nature," and not something different. "While God's care for man would be constant whether he had sinned or no, it is the fact of his sin which makes necessary the departures from the normal course of conduct."[34]

The Natural Law focus presses to its ultimate implications the sovereignty of God, one in being and purpose. There is no paradox in God. Whatever paradox may be is in man's situation of "being-in-tension"—in the dialectical "actual nature" of man.

When we speak of the controlling order of reality (which in Christian terms is the sovereignty of God) and man's moral responsibility as the two basic principles of Natural Law doctrine, we do not mean that they occupy an equal status in real existence. Nor are they equi-polar in the working out of a doctrine of ethics. To the contrary, the sovereignty of God is precisely that—total, absolute, and final sovereignty. "There is nothing either above Him or after Him; nor that, influenced by any one, but of His own free will, He created all things, since He is the only God, the only Lord, the only Creator, the only Father, alone containing all things, into existence."[35] Man's moral responsibility *is* only through the freedom graciously granted by God. Man's moral responsibility, though "real," is created. God, in his infinite wisdom and freedom, could remove man's freedom in the twinkling of an eye. We cannot speculate as to the circumstances beyond such a divine act; we can only confess our belief that such an act would be good if God did it. But this we can say, which is not speculation. If man's freedom and

hence his responsibility were removed, then all talk of ethics would be nonsense, and in Christian ethics, in which love and sin alike posit freedom, it would be nonsense carried to the nth degree. As long as there is such a thing as Christian ethics, there must be the moral responsibility of man as well as the sovereignty of God.[36]

From the conversionistic theological point of view, Natural Laws express the unitary purpose of God in creation and redemption, being at once expressions of God's grace, justice, and love. Natural Laws define the real nature that God has given to man, and the nature of man's fulfilment as God wills it. It is to God and not to laws that men rightly respond, and the Natural Laws are gracious indications of the ways in which men may respond realistically to Him in whose bondage is perfect freedom.

1. Ernst Troeltsch, The Social Teachings of the Christian Churches (1949). Troeltsch says: "Stoic Natural Law in Christianity not only fixed and defined the ethical conception in general within Christianity, but it was also the means of placing the world, that is, the State, the law, and the system of social functions, in the right relation to the existence of the Church and the community of the redeemed." (Vol. I, p. 144) "The Christian theory of Natural Law . . . as a practical doctrine is of the highest importance for the history of civilization, and of the social evolution—it is the real ecclesiastical doctrine of civilization, and as such it is at least as important as the doctrine of the Trinity, or other fundamental doctrines." (*Id.*, p. 160) Whatever reservations one may have regarding these statements of Troeltsch, they do indicate sufficiently the importance of the doctrine of Natural Law in the minds of some Christian historians and theologians.
2. William Temple, Basic Convictions 54 (1936).
3. Karl Barth, This Christian Cause (1941).
4. R. L. Calhoun, The Place of Religion in Higher Education 3 (1943). Professor Calhoun, meaning more than a doctrinal system, says that "complete education" must provide "a perspective or unifying frame through which the details, specialized skills and specialized knowledge become a systematic whole." This perspec-

tive or unifying point of view consists of "an inclusive theoretic outlook or point of view from which the world and oneself can be understood after a fashion, and a no less inclusive dynamic or loyalty by which all that one is, thinks and does may be vitalized and directed." Precisely the same thing may be said of the Christian religion, of course, and it will be helpful to us to take over Professor Calhoun's wording into our own area of concern.

5. Paradox, like allegory, is just as respectable as the man who uses it. It seems clear that we are dependent on the competence and honesty of the leading contemporary exponents of paradox to prevent an "anything goes" situation from arising in Christian theology—a situation which would open the way to the inclusion in Christian theology of numerous diverse and unsaddled elements.
6. Professor H. Richard Niebuhr's The Meaning of Revelation (1946) is a notable example of what we mean. This book, with its perspectival approach afforded by a profound understanding of the meaning of revelation, is the root inspiration for John Knox's On the Meaning of Christ (1947) and Edward T. Ramsdell's The Christian Perspective (1950). This theological approach combines the "breadth values" of the historical method with the "depth values" of a "new" revelatory-interpretative method.
7. See Ramsdell, *op. cit. supra,* note 6. Professor Ramsdell indicates the profoundly determining nature of perspective as "the definitive a priori element" in one's interpretation of facts. (P. 19) This places the crucial concern at the point of one's essential faith, so that what we face in seeking and interpreting truth is "never, at bottom, a matter between faith and reason but rather between faiths which define the divergent perspectives of reason." (P. 42)
8. See Ramsdell's treatment of "significance." *Supra,* note 6.
9. See Heinrich Rommen, The Natural Law 30-31 (1948). A constant danger in Natural Law thinking is a presumed independence in regard to content as well as to form. Rommen's translator, Thomas R. Hanley, adds that the *philosophia perennis* denotes "a body of basic philosophical truths that is perennial, enduring, abiding, permanent, eternal—a philosophy that is as old and as new as philosophical speculation itself. It is one whose 'validity and truth content is not confined to any particular age or civilization but is absolute and enduring.' In other words, *philosophia perennis* is the accumulated fund of sure philosophical truths: 'the eternal store of primordial philosophical truths which remains in spite of all evolution and change'; 'a stock of fundamental truths which survive the change of time and prevail over and above the differences of systems.' "

10. H. Richard Neibuhr, The Meaning of Revelation 49 (1946).
11. William Temple, The Centrality of Christ 16 (1936).
12. Deuteronomy 6:18.
13. Deuteronomy 6:24.
14. Irenaeus, in Ante-Nicene Fathers (hereinafter ANF) I, 480. "At first God deemed it sufficient to inscribe the Natural Law, or the decalogue, upon the hearts of men; but afterwards he found it necessary to bridle, with the yoke of the Mosaic Law, the desires of the Jews."
15. Rommen, *op. cit. supra* note 9, at p. 37.
16. Origen, De Principiis (ANF IV, 268).
17. Methodius, ANF VI, 373.
18. *Op. cit. supra* note 6, at pp. 32, 72, 80.
19. *Op. cit. supra* note 1, Vol. I, p. 197.
20. The notion of "common reason" has some legitimacy if it is restricted to relatively naïve matters, such as the rudimentary social acts of procreation, or immediately-determined right and wrong actions, and the like. However, the contents and form of these actions vary widely. It almost amounts to saying that the Natural Law with which "common reason" has to do simply requires that there be those actions which formally are necessary to "some form of social life," but the actual determinants simply are not included, because they do not come within "common reason." It is when Natural Law reaches the "sophisticated" stage of a system requiring a conception of ultimate reality and of man's relationship to it that Universal Natural Law as a real system with real content and open to the "reason" of all men becomes an obvious impossibility. Not only does "reason" not afford a universally-accepted view of ultimate reality; it cannot do so. The view of ultimate reality is at last a contribution to faith, whether in the case of Plato or of a modern Christian. Faith provides the perspective. The perspective and the conception of ultimate reality are always intimately related.
21. We use the language of quantity here, though fully aware that the distinction we are making actually is qualitative.
22. Cf. Irenaeus, III, 25, 5.
23. See especially Francis Macdonald Cornford, The Republic of Plato (1945).
24. If, however, we think of the discords as due not so much to accident or ineptness as to the wilful effort of each musician to play a self-written score or to try to be the director, we are closer to a Christian picture of sin.
25. William Temple, The Church Looks Forward 81 (1944).
26. William Temple, Basic Convictions 13 (1936).

27. John Calvin, Institutes of the Christian Religion (7th Am. ed. 1936) I, 51.
28. *Ibid.*, pp. 63-64.
29. William Temple, Nature, Man and God 90 (1949).
30. Clement of Rome, The First Epistle of Clement, Chaps. XIX and XX (ANF, Vol. I).
31. *Ibid.*, ANF I, 32-33.
32. William Temple, The Centrality of Christ 21 (1936).
33. *Ibid.*, p. 22.
34. *Ibid.*, p. 23.
35. Irenaeus, Against Heresies, II, I, 1.
36. Emil Brunner, Our Faith 40 (1949). "The freedom to say yes or no to God is the mystery of man. We have this freedom from God because he has addressed us. Were God to cease speaking to us, we could answer no more, either yes or no. We would then have ceased to be men."

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